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Ideology in Criminal Procedure

or

A Third "Model" of the Criminal Process^{*}

John Griffiths[†]

American thought about criminal procedure is confined within a prevailing ideology.¹ By describing an alternative, I shall seek to il-

^{*} This title, as the reader will understand in retrospect, is in several respects something of a misnomer. A central theme of this article is that Packer, to whose article of a similar name, *see* note 2 *infra*, this title alludes, has given us not the two "models" he claims, but only one; hence this article should be entitled "A Second Model of the Criminal Process." It seems better to sacrifice such logic to rhetorical convenience. A similar consideration dictated use of the word "model," despite the fact, discussed in note 14 *infra*, that we are concerned with ideologies and perspectives, not models. Finally, one of the most important features of the alternative ideology I shall develop is that it rejects the dichotomy between substance and process characteristic of the kind of thinking about criminal procedure which Packer exemplifies and which is implicit in the title I have borrowed from him.

[†] Assistant Professor of Law, Yale Law School. B.A. 1962, University of California (Berkeley); LL.B. 1965, Yale University.

1. The concept of "ideology" has a long and tortured history. *See especially* K. MANNHEIM, *IDEOLOGY AND UTOPIA* (1936). I am not, in this article, primarily interested in the relation of ideology to self-interest, social structure, or the like. *Cf. however*, pp. 414-16 *infra*. I am concerned, whatever its genesis, with its effect on thought. I use the word to refer to that set of beliefs, assumptions, categories of understanding, and the like, which affect and determine the structure of perception (not only of physical phenomena, like causation, which has consumed the interest of philosophers, but also, and most particularly here, of social facts, relationships and possibilities). Ideological beliefs are pre-logical because they determine the structure of perception and consciousness and therefore are enmeshed in the factual and linguistic premises of argument. It is only self-consciousness concerning the existence and nature of ideology which permits an appreciation of the extent to which it determines the contents of the world of experience and possibility. Self-consciousness is therefore the primary intellectual virtue. The analytic rigor appropriate to logical discourse is relatively less important, because the very content of the concepts to be used is at stake, and the latent propositions involved do not submit themselves to the sort of empirical or logical refutation that is possible once the ideological structure of a domain is set. The preceding ideas all have an extensive literature of their own, and they will figure, more or less explicitly, in the entire remainder of this article. Whatever the difficulties may be with the concept of ideology, it is an essential critical concept of which far too little use has been made in legal scholarship. *Cf. A. BLUMBERG, CRIMINAL JUSTICE* (1967), where the concept of ideology is invoked as an explanatory tool, but is used only to refer to factual misconceptions and to the conceptions of the criminal process which they serve to support—these might, in turn, be related to ideological preconceptions, but that analysis is not undertaken. *See id.* at xiii and 32-37, in particular. *Compare* Packer's occasional use of the word in the same loose way, note 14 *infra*. *Cf. also* L. RADZINOWICZ, *IDEOLOGY AND CRIME* (1966), which is an excellent book, but is concerned with criminogenic theories, not with "ideologies" as I am using the word.

lustrate that our present assumptions are not the inevitable truths they often seem to be. The alternative presented is not especially novel, nor is it one to which I necessarily subscribe. My purpose is merely to explore the problem of ideology in criminal procedure, and to that end the self-conscious posing of an alternative is justified by its heuristic value.

I. Herbert Packer's "Two Models of the Criminal Process"

As the title of this article will have suggested to those familiar with Herbert Packer's "Two Models of the Criminal Process,"² it is my point of departure. Packer's article nicely represents the fundamental underlying ideology of American thought. It is largely by way of contrast with Packer's implicit ideological assumptions that I will formulate an alternative ideology.

A. *The Scope of Packer's Theory*

Packer's article is widely regarded as the most important recent contribution to systematic thought about criminal procedure.³ Unlike the usual works of doctrinal argumentation, Packer's addresses itself to the basic assumptions and principles upon which discussions of procedural matters—if often unself-consciously—necessarily rest. Packer sets out to construct an analytic structure which comprehends "the spectrum of choices that is at least in theory open in fixing the shape of the criminal process."⁴ This "spectrum of normative choice"⁵ will permit us, within its compass, "to recognize explicitly the value choices that underlie the details of the criminal process."⁶ It will provide us "with an understanding of the criminal process that pays due regard to its static and dynamic elements," and with it we can "have an idea of the potentialities for change in the system."⁷

2. Packer's essay of this title originally appeared at 113 U. PA. L. REV. 1 (1964); it now also appears as Part II of his new book, *THE LIMITS OF THE CRIMINAL SANCTION* (1968). The two versions are virtually identical. I shall usually give page references only to the book [hereinafter cited as *LIMITS*]. Whenever a reference is to a place where the book differs significantly from the article [hereinafter cited as *Models*], I shall so indicate either by citing only to the article or by noting that a passage does not appear in the article. I shall also indicate when I am referring to a part of the book other than Part II.

3. This judgment is based mainly on academic shoptalk. Cf. Duke, *Prosecutions for Attempts to Avoid Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1, 2 n.4 (1966), referring to Packer's "unusually perceptive analysis."

4. *Models* at 2.

5. *LIMITS* at 154 (not in *Models*).

6. *Id.* at 153.

7. *Id.* at 152.

As the notion of a "spectrum" suggests, Packer's analytic structure consists of two poles and the line between them. On this line, he says, lie all our present practices and all our future possibilities; the "day to day functioning [of the criminal process] involves a constant series of minute adjustments between the competing demands of two value systems and [its] . . . normative future likewise involves a series of resolutions of the tensions between competing claims."⁸ The poles are "extremes" of the values represented on the line, so the purpose of describing them is not to suggest that either might serve "as a program for action," but to "clarify the terms of discussion by isolating the assumptions that underlie competing policy claims."⁹

Before considering the specific nature of Packer's poles, it is well to reemphasize the scope and basic form of his claim. He offers us an analytic structure which, he says, encompasses all possible value choices available to us in criminal procedure.¹⁰ All this is to be accomplished with the very simplest of devices, two poles and the spectrum between them: "It will take more than one . . . , but it will not take more than two."¹¹ Widespread agreement that he achieved

8. *Id.* at 153.

9. *Id.* at 154.

10. His analytic structure, he says, "does not make value choices." *Models* at 6.

11. *LIMITS* at 153. This confident and explicit assertion does not appear in the original version of the essay, which seems to suggest that he has gained confidence in the sufficiency of his analytic structure.

Packer warns against taking either pole as an ideal—against the "danger of seeing one or the other as Good or Bad." *LIMITS* at 153; *cf. Models* at 5 for the same idea. As he says, "When we polarize, we distort," *Models* at 6. The poles "are distortions of reality," *LIMITS* at 153. But the danger he has in mind lies in the potential "demand [for] consistently polarized answers to the range of questions posed in the criminal process." *Id.* at 153-54 (not in *Models*). He does not doubt that all values are on his spectrum—only that they are all at a particular end of it.

Packer does exclude some potential features of a conceivable criminal procedure system from his analysis. Since the exclusions do not significantly reduce the magnitude of his claim, I have not mentioned them in the text; and since they are not relevant to my own thesis, I shall not take account of them hereafter. In brief, these "relatively stable and enduring features of the American legal system," *LIMITS* at 155, are: the proscription of *ex post facto* creation of offense categories and the implications of that proscription; the general requirement that prosecutors prosecute, *i.e.*, the lack of prosecutorial dispensing power; the assumption that there are *some* limits on the powers of the police to invade the security and privacy of individuals; and the principle that an alleged criminal is entitled to put his accusers to their proof before some independent tribunal. *See id.* at 154-58.

At only one place, so far as I can see, does Packer allude to the possibility of a "model" based upon assumptions different from those common to his two: he mentions that "[o]ne could construct models that placed central responsibility on adjudicative agents," instead of on the parties. *Id.* at 172. But, he says, "it is enough to say . . . that the animating presuppositions that underlie both models in the context of the American criminal system relegate the adjudicative agents to a relatively passive role" *Id.* It is by no means clear that the "stable and enduring features of the American legal system" which he earlier singled out include *these* "presuppositions." Thus, his failure to consider

at least considerable success surely accounts for the high repute of his article. I hope to show, however, that Packer does not begin to exhaust the possibilities, and that the plausibility and general acceptance of his claim lies precisely in the fact that his two poles represent rather well the conflicting strains within the basic ideology of American criminal procedure. It is the nature and scope of his endeavor which make his article so fruitful a starting point for ideological study.¹²

B. *The Contents of Packer's Theory*

The poles are the "two separate value systems that compete for priority in the operation of the criminal process."¹³ Packer calls them "models"¹⁴—the "Crime Control Model" and the "Due Process Model."

these possible models must rest on some ground other than their exclusion by the assumptions on which his analysis explicitly rests.

12. It is what Packer assumes, rather than what he makes explicit, that is most revealing and interesting. As Glanville Williams observes at the beginning of his book *THE PROOF OF GUILT* 1 (3d ed. 1963), "We have all found that when acting as host or guide to a visitor from abroad we have learned many things about our own country and its institutions from the stranger's surprise. His questions and astonishment throw a new light on what we have taken for granted. Some of us have had this experience when trying to explain the English criminal system to foreign lawyers."

13. *LIMITS* at 153.

14. *Query about this word.* The first few times I read the "Two Models" article, my mind did not pause over the word "model." The more I think about it, however, the less it conveys. I now believe that much of what I have to say about the ideological content of Packer's article could be got by exegesis of his misuse of this one word.

There are a variety of senses in which one can use the word. Cf. M. BLACK, *Models and Archetypes*, in *MODELS AND METAPHORS* 219 (1962); *OXFORD ENGLISH DICTIONARY* 568-69 (2d ed. 1961). Packer plainly does not think that either of his "models" is a writ-small version of something, nor that writ large either would be a functioning system of criminal procedure. Since he tells us that anyone who subscribed wholeheartedly to the values of one model to the exclusion of those of the other "would rightly be viewed as a fanatic," *LIMITS* at 154, we cannot take the "models" as alternative ideals toward which one might strive. Nor are they entities which have an analogical or metaphoric relationship to an actual system of criminal procedure. We cannot take Packer to be thinking of his "models" as systems of rules built upon hypotheses, for he says nothing at all about their internal logic; we are given no way to determine whether a particular "value"—e.g., efficiency—belongs more with one than with the other, except that Packer happens to assign it to the Crime Control Model.

What does Packer give us? Not "models," surely, but perhaps "perspectives" or "interpretations". (He himself occasionally calls them "ideologies," see, e.g., *id.* at 163, but he gives no account of the sense in which he uses the word. See note 1 *supra*.) Much of the awesomeness of his claim evaporates if one translates his article's title into language with which we are more familiar: "Two Perspectives on the Criminal Process." What he is really telling us is that among American lawyers there are two main perspectives on the criminal process. He has caricatured them a bit and exaggerated their differences so we can clearly see the terms of the debate between those who hold more to one than to the other. We would see better what he is doing if he called his "models" the "Police Perspective" and the "ACLU Perspective" (or perhaps the "Academic Perspective" since he tells us, at one point, that the Due Process Model "is to a significant extent the model of the schools." *Id.* at 243). It would then have been clear that he was describing the terms in which criminal procedure is in fact being debated just now in the United States and not all possible positions in almost all possible debates on the subject.

What, then, of my own use of the word "model"? First, there is ease: I can discuss

They are the "extremes" of the spectrum of possible choice in criminal procedure, and one is led to anticipate that they will reflect assumptions about "the uses of power"¹⁵ which differ as widely as the imaginations of human beings have been fertile, and their convictions deep, on the place and use of power in society.

The Crime Control Model "is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process."¹⁶ "Criminal conduct" must be kept under "tight control" in order to preserve "public order."¹⁷ The primary concern is efficiency. The process "must produce a high rate of apprehension and conviction," and must therefore place "a premium on speed and finality."¹⁸ It should "throw . . . off at an early stage those cases in which it appears unlikely that the person apprehended is an offender and then secure, as expeditiously as possible, the conviction of the rest"¹⁹ To this end, a quick, accurate, and efficient administrative fact-finding role carried out by police and prosecutors should predominate over slow, inefficient, and less accurate judicial trials; and interference with this administrative process should be kept to an absolute minimum so as not to compromise "the dominant goal of repressing crime."²⁰

The Due Process Model seems radically different. Its system of values revolves around "the concept of the primacy of the individual and the complementary concept of limitation on official power."²¹ Because of its potency in subjecting the individual to the coercive power of the state, "the criminal process must . . . be subjected to controls that prevent it from operating at maximal efficiency."²² "Power is always subject to abuse," and the Due Process Model "implements . . . anti-authoritarian values" by limiting state power

Packer more readily if I use a parallel vocabulary. But second, I think there will emerge from my discussion of Packer's views a principle of internal logical consistency for each of his "models," for the larger "model" under which I subsume them both, and for the contrasting "model" which I propose. See note 60 *infra*. I also rely on analogy to other structured human relationships as a means of extracting the ideology which unites Packer's two "models" and of posing an alternative—those other relationships are thus "models" in a more or less proper sense of the word for the criminal process (albeit they are not *empirical* but *ideological* models).

15. Packer describes his book as "an argument about the uses of power," and asserts that "the criminal sanction is the paradigm case of the controlled use of power within a society." LIMITS AT 5 (Part I of the book). See note 81 *infra*.

16. LIMITS at 158.

17. *Id.*

18. *Id.* at 159.

19. *Id.* at 160.

20. *Id.* at 162.

21. *Id.* at 165.

22. *Id.* at 166

over an accused in the criminal process.²³ This central thrust is complemented by a skepticism about the reliability of uncontrolled administrative fact-finding and a general intolerance of any significant margin of error—again, denying to efficiency in “repressing crime” a predominating position among relevant considerations.²⁴ The main incidents of a central concern for limiting power and protecting against its abuses are: the concept of legal guilt and the corollary presumption of innocence; the conception of the criminal process as an appropriate forum for the correction of its own abuses; and the insistence upon the state’s duty to ensure that an accused is not deprived by poverty of the capacity effectively to invoke the protections which the process must afford.²⁵

Given the scope of Packer’s claims, one might expect that the two Models would be developed with considerable depth and rigor, but the brief summary I have given in fact encompasses virtually all that Packer has to say about them.²⁶ The reason for this is critical to an understanding of his theory. For Packer, the Models seem to be defined primarily by their relationship to each other. Their contents are determined by the nature of that relationship, rather than the other way around. It is the essential fact of tension between two diametrically opposed reactions that the relationship of the state to the individual can elicit which sets the problem of criminal procedure, and thereby defines the Models. For the Crime Control Model, the problem is effective protection of society as a whole from the threat of a breakdown of law and order posed by unrepressed criminal activities. The concern of the Due Process Model is with the need to protect individuals caught up in the criminal process from the coercive, easily abused power of society. Each Model, in its polar form, subordinates other considerations to its central, animating conception of the problem. Criminal procedure as it is, and also as it might be, is determined by a selection from among the possibilities for compromise located on the spectrum between the two polar Models.

The “functional approach” is by now so ingrained that at least a genuflection toward “substance” is mandatory in any discussion of “procedure.” Thus one instinctively wonders what relationship there might be between the two Models and the range of possible substan-

23. *Id.*

24. *Id.* at 164-65.

25. *Id.* at 166-70.

26. *Id.* at 158-73.

tive functions of the criminal law. At the outset of his article, Packer describes its "major premise": "that the shape of the criminal process has an important bearing on questions about the wise substantive use of the criminal sanction."²⁷ He wants to limit the ends of the process so that the means will be able to be subservient—so that the process will not be overburdened or put to tasks for which it is unsuited.²⁸ But one will search his essay in vain for the suggestion that substantive functions should have any role whatsoever in the making of procedural choices or that the substantive functions of the process include anything more than enforcement of prohibitions.²⁹ One would suppose, nevertheless, that procedure has no independent, intrinsic value, and that the more fundamental relationship runs from substantive functions to procedural techniques; it is wise to suggest that we build the sort of houses for which the available materials are suitable, but it is surely even wiser to insist that we look for materials suited to the kinds of houses we wish to build.³⁰

I think there are three explanations for Packer's strange lack of interest in what the process, after all, is all about. First, his attention is so dominated by his "major premise"—the need to put fewer and more narrowly defined demands on the process—that he is simply not concerned about the more fundamental reverse relationship of means to ends. Second, he takes the *general* substantive functions of the criminal law (*i.e.* those common to all crimes) as pretty well fixed;

27. *Models* at 1-2. In a footnote at this point he refers to those who "treat procedural issues as if their resolution had nothing to do with judgments about the substantive uses of the criminal law, which apparently are thought to be immutable." *Id.* at 1 n.2. He develops this premise further with two propositions: the overall efficiency of the process should affect our decision whether to employ criminal law as the instrument of social control over various kinds of behavior; and the nature of the process may make it particularly unsuited to specific objects of social control, *e.g.*, victimless crimes. *LIMITS* at 150-52. Part III of his book is in large part devoted to these two propositions.

28. *LIMITS* at 365-66 (Part III of the book). At one point, in suggesting that the Due Process Model is in part animated by scepticism about the morality and usefulness of the institution of criminal punishment, Packer notes that our substantive concerns may have effects on procedural choices. *Id.* at 170-71. He does not develop this point, however: "It is properly the subject of another essay." *Id.*

29. *Cf.*, however, note 28 *supra*. In the book, as contrasted with the essay, there are a few hints. At one point in the final third of the book he says, in criticizing "assembly-line" justice, that "[t]he rationale of the criminal sanction demands that a judgment of conviction be both weighty and considered." *Id.* at 292 (Part III of the book). This is connected with his theory that the element of community condemnation is essential to the criminal law. *See id.* at 261-64 (Part III of the book). *See also id.* at 43-44 (Part I of the book), where he discusses the "heavy symbolic significance" of the operation of the process.

30. It is true that he says at one point that "means ought to be subservient to ends," but it turns out that he really has his quite different "major premise" in mind—*i.e.* that we must restrain ourselves in assigning ends to the criminal law lest we outrun the process' capacity to be a subservient means. *LIMITS* at 365 (Part III of the book).

elsewhere he argues that "[t]he function of the criminal sanction is to help prevent or reduce socially undesirable conduct through the detection, apprehension, prosecution, and punishment of offenders. This is the only function that its rationale permits"³¹ If the general substantive function can be treated as given, I suppose it follows that an analytic structure for dealing with choice about process need not make room for other kinds of possible functions. Both of these explanations are perfectly reasonable so long as the limitations they imply are kept clearly in mind.³²

The third explanation is especially interesting. Packer's sentence, begun above, continues: "[The detection, apprehension, prosecution and punishment of offenders] is the only function that its rationale permits *and this is the only function with which its processes are adequately equipped to deal.*"³³ Here we can clearly see the ideological limits within which his conception of two Models is confined: despite his intention to lay bare the entire spectrum of procedural possibility, the two Models in fact give us only that which is relevant to a particular and limited conception of the substantive function of criminal law—prevention and retribution. Packer does this not only because he thinks that function is substantively fixed, but also because he has made an initial judgment that the criminal process is intrinsically unsuited to any other. Starting with narrow assumptions about both procedural and substantive possibilities, Packer is easily led to a unidimensional conception of the total range of procedural choice.

The prejudicial impact of Packer's initial assumptions appears, to give a single instance, in his off-hand characterization of the Due Process Model's protections as impairing the "efficiency" of the process. These protections can only be deemed simply "inefficient" if the values they serve are not included among the substantive goals of the criminal process. It might be, for example, that the privilege against self-incrimination serves rehabilitative ends; if one of our substantive goals were rehabilitation, the privilege could hardly then be

31. *Id.* at 293 (Part III of the book). He also maintains that the only "ultimate purposes to be served by punishment" are retribution and prevention. *Id.* at 36 (Part I of the book).

32. If, for instance, crime is essential to a healthily functioning society, as Durkheim argued, and if the criminal process is necessary to a society's maintenance of its values and its sense of identity at the points of greatest stress, as some modern sociologists suggest, one might consider Packer's conception of the functions of the administration of criminal law, as they bear on the understanding of process, far too limited. *Cf.* K. ERIKSON, *WAYWARD PURITANS* ch. 1 (1966).

33. *LIMITS* at 293 (Part III of the book) (*italics added*).

described, without qualification, as making for an “inefficient” process. If we believe the substantive criminal law should be designed to minimize social interference in the lives of citizens,³⁴ many of the protections of the Due Process Model, far from being compromises with the interest in “efficiency,” may be essential to it.

II. A Third “Model” of the Criminal Process

A. *Packer Has Given Us Only One “Model”—the Battle Model*

A single unifying conception underlies Packer’s two Models, despite the fact that he presents them as diametrically opposed. He derives the two Models from the alternative responses he conceives to the problem of the relationship of the state to the individual in the criminal process; and the unarticulated major premise of his article is that the essential nature of that problem is such as to permit only two, polar responses.

The basic object of the criminal process is “to put a suspected criminal in jail,” as he puts it at one point.³⁵ In the service of this fundamental dogma, Packer consistently portrays the criminal process as a struggle—a stylized war—between two contending forces whose interests are implacably hostile: the Individual (particularly, the *accused* individual) and the State. His two Models are nothing more than alternative derivations from that conception of profound and irreconcilable disharmony of interest. Since the metaphor of battle³⁶ roughly suits this silent premise about the nature of the relationship of state and individual reflected in the criminal process, I shall use it to characterize Packer’s position: the Battle Model of the criminal process.

Since one or the other party to a process for settling disputes between irreconcilables must win in every case, the crucial question for criminal procedure so conceived is what bias to build into the rules.³⁷ This is where Packer’s Models differ. The Crime Control

34. My colleague, Joseph Goldstein, is wont to remark in conversation that “one purpose of the criminal law ought to be to protect as much deviant behavior as society can tolerate.” See also pp. 374-75 *infra*.

35. *LIMITS* at 151.

36. Cf. Mead, *The Psychology of Punitive Justice*, 23 *AM. J. OF SOCIOLOGY* 577, 585-87 (1918).

37. From this idea that the bias of the rules is the only real issue in the administration of criminal law follows one of the commonest clichés in the area: that “the history of liberty is largely a history of procedural safeguards,” see E.B. WILLIAMS, *ONE MAN’S FREEDOM* 145 (1962), or, in another variation, that *habeas corpus* is the difference between civilization and tyranny, see Rostow, *Introduction*, *id.* at ix (quoting Winston Churchill);

Model reflects a primary concern with the threat which individuals pose to the general social order and welfare; accordingly, it is designed to protect society by favoring it as much as possible through the rules of battle. The Due Process Model represents the alternative reaction to the assumed state of irreconcilability—an inclination to offset state power in the battle by providing rules as favorable as possible to an accused. Packer characterizes the processes required by his two Models as resembling, respectively, an “assembly line” and an “obstacle course” in their approach to the common goal of putting a suspected criminal in jail.³⁸ Given his unarticulated, unifying assumption of unyielding disharmony, the process can vary fundamentally only from the pole at which one party is most favored to the pole at which the other party is most favored. What he gives us is a single Battle Model with two possibilities of bias.

The achievement of Packer's article, then, is neatly and methodically to have laid out the differences which animate current debate over the criminal process within the context of an implicitly agreed-upon ideological premise which unites it. While it does not seem feasible to *demonstrate* that the ideological underpinnings of Packer's position are generally shared, it will be helpful at least to illustrate the point briefly.

First, rhetoric is revealing.³⁹ There are many trite turns of phrase which give away a writer's underlying ideology. One has found an instance of the Battle Model when he comes across the process conceived as a “battle” or “fight” or “duel,”⁴⁰ with any of the associated military terms: the defense counsel is a “champion of the accused”⁴¹

P. DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 81 (1958). The latter idea is of course preposterous. The former is based on the Battle Model ideology; but unless liberty is *defined* in terms of the presence of particular criminal procedure safeguards, its empirical validity is certainly problematic. Cf. note 81 *infra*.

38. *LIMITS* at 163.

39. Compare *id.* at 10 (Part I of the book), noting that the economic rhetoric (the criminal “pays his debt”) often used with respect to punishment, reveals the presence of retributionist theory.

40. See J. FRANK & B. FRANK, *NOT GUILTY* 225-26 (1957) (deploring the “fighting method”—*N.B.* the quotation from Quentin Reynolds, at 225, which uses in a space of two sentences all three of the words referred to in the text). Stephen says emphatically that the battle quality of trials goes to their essential, unavoidable nature. 1 J.F. STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 432 (1883). As Glanville Williams notes, Bentham “was scornful of the analogy between a criminal trial and a private combat.” G. WILLIAMS, *supra* note 12, at 49.

41. See FRANK & FRANK, *supra* note 40, at 225 (quoting Quentin Reynolds). Cf. N. BIRKETT, *SIX GREAT ADVOCATES* 100 (1961), where the champion conception is propounded. I am taking some liberties here, and elsewhere in this article, with my claim to be discussing a typically American ideology, by invoking English as well as American authors.

(or a "hired gun"⁴²); the defendant is the "target" of the criminal process;⁴³ to confess is to "surrender";⁴⁴ the initial police warning before a suspect makes incriminating statements serves as a "declaration of war";⁴⁵ the defense must not be precluded, by procedural rules which give "tactical advantages"⁴⁶ to the prosecution, from a fair opportunity to "muster" its forces or "marshal" its proofs;⁴⁷ the judge's role is "to see that the battle is fought according to law."⁴⁸

The Battle Model makes its appearance not only in common figures of speech but also, and perhaps more significantly, in the fundamental attitudes which pervade scholarly writings about criminal procedure. The notes to this article identify a number of the Battle Model's appearances in the literature. One article, however, is of special interest as an illustration of my thesis that the unarticulated ideology implicit in Packer's analysis is a virtually universal one. It gives itself away in its title. In "The State and the Accused: Balance of Advantage in Criminal Procedure"⁴⁹ my colleague A. Goldstein levels a long and devastating attack upon Judge Learned Hand's notorious opinion in *United States v. Garsson*.⁵⁰

42. I cannot find an instance of this common aspersion in print. Pound refers to "professional defenders of accused persons, who study the weak points in the system and learn how to take advantage of them." Pound, *Criminal Justice and the American City*, in R. POUND & F. FRANKFURTER, *CRIMINAL JUSTICE IN CLEVELAND: A REPORT OF THE CLEVELAND FOUNDATION SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN CLEVELAND, OHIO 636* (1922) [Pound's essay will hereinafter be referred to as *Pound*; the remainder of the volume will be referred to as *SURVEY*].

43. Duke, *supra* note 3, at 2. In *Holland v. United States*, 348 U.S. 121, 126 (1954), the Court observed that indirect methods of proof in tax cases (e.g., the net worth method) "have evolved from the final volley to the first shot in the Government's battle. . . ." Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 *CLEVELAND B. A. J.* 91, 98 (1954), refers to "the principle that a man is not obliged to furnish the state with ammunition to use against him." FRANK & FRANK, *supra* note 40, at 222, observe that "many a mistaken witness for the prosecution may be a lethal weapon directed at the accused, endangering his life or liberty."

44. Fortas, *supra* note 43, at 99.

45. DEVLIN, *supra* note 37, at 133. Duke provides a comparable American version of this rhetorical conception. One of the arguments he makes about the procedural unfairness of tax prosecutions is that the civil/criminal hybrid deprives the potential target of any formal declaration of war. This is because "The revenue agent calling upon a taxpayer to examine his books [might only be there in a civil capacity, and therefore] is not analogous to the policeman who raps on the door." Duke, *supra* note 3, at 35, and generally, at 34-41.

46. See Duke, *supra* note 3, at 34. Cf. REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 278 (1967) (quoting former President Johnson, "Together we must chart a national strategy against crime.").

47. Cf. A. Goldstein, *The State & the Accused: Balance of Advantage in Criminal Procedure*, 69 *YALE L.J.* 1149, 1179 (1960).

48. T. PARKER, *THE PLOUGH BOY* 151 (Arrow ed. 1969) (summing-up of Mr. Justice Hilbery in *R. v. Davies*). Cf. 2 F. POLLOCK & W. MAITLAND, *HISTORY OF ENGLISH LAW* 670-71 (Milsom ed. 1968). Cf. also, in this connection, G. WILLIAMS, *supra* note 12, at 23-25; 1 STEPHEN, *supra* note 40, at 543-44.

49. 69 *YALE L.J.* 1149 (1960).

50. 291 F. 646 (S.D.N.Y. 1923) (denying motion to inspect grand jury minutes).

Judge Hand had given rather unjudicious vent to the opinion that

[o]ur dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.⁵¹

Anticipating Packer by some four years, Goldstein observes that Hand's "view is widely held and, indeed, serves in considerable part as a *model* of the entire criminal process."⁵² It is the Crime Control Model, tilting against the Due Process Model ("watery sentiment") which gives the accused "every advantage"⁵³ on the basis of factual assertions about the practical effect of the rules of the process.

Goldstein counterattacks for the Due Process Model against this "hard-boiled" and "modern" view of criminal procedure,⁵⁴ and he does so on Hand's own territory:

[T]he fact is that his view does not accurately represent the process. Both doctrinally and practically, criminal procedure, as presently constituted, does not give the accused "every advantage" but, instead, gives overwhelming advantage to the prosecution. The real effect of the "modern" approach has been to aggravate this condition by loosening standards of pleading and proof without introducing compensatory safeguards . . .⁵⁵

The rest of Goldstein's article is devoted to demonstrating this thesis about where "advantage" in criminal procedure really lies. It is an effective job. The position Hand took is indefensible and advocates of the Crime Control Model would have to retreat (as Packer notes that they can⁵⁶) and regroup on the question where advantage *ought* to lie.

51. *Id.* at 649.

52. Goldstein, *supra* note 47, at 1151 n.8 (italics added) (citing cases and articles). Although Goldstein thus has precedence on the use of the word "model," its inappropriateness is manifest in the quoted passage: a "view" can hardly be a "model." But it seems clear he means nothing more complicated than "perspective" by it. See note 14 *supra*.

53. 2 F. POLLOCK & W. MAITLAND, *supra* note 48, at 670-71, also refers to two "models"—of the judge's role in the criminal process: that in which he is the "man of science who . . . will use all appropriate methods for the solution of problems and the discovery of truth," and that in which he is "the umpire of our English games, who is there, not in order that he may invent tests for the powers of the two sides, but merely to see that the rules of the game are observed." This usage seems proper, by contrast with that of Packer and Goldstein, since an entity with an alleged analogical relationship to a kind of judicial behavior is invoked.

54. 291 F. at 649.

55. Goldstein, *supra* note 47, at 1151.

56. *Id.* at 1152.

Thus, he observes that the Crime Control Model is "more tolerant about the

For my purposes, the most interesting point is that the entire affray is encompassed by the Battle Model ideology. Goldstein does not challenge the terms of debate laid down by Hand. Recognition that there might be other ways of looking at problems of procedure comes in a single phrase: "If Judge Hand's view represented an accurate appraisal of the formal system of criminal procedure, it would be difficult to join issue with his conclusion, *except on broad philosophical grounds.*"⁵⁷

B. *An Altogether Different Conception of the Criminal Process—the Family Model*

If Packer's article rests not upon two but upon a single, albeit unarticulated, basic conception of the nature of criminal process—that it is a battleground of fundamentally hostile forces, where the only relevant variable is the "balance of advantage"—we can expand the conceptual (and perhaps the practical) possibilities available to us if we create another fundamental conception to substitute for it. It may well be that there are many possibilities,⁵⁸ but we can do a great deal even while confining ourselves to the simple opposite of Packer's ideological starting point. He assumes disharmony, fundamentally irreconcilable interests, a state of war. We can start from an assumption of reconcilable—even mutually supportive—interests, a state of love.

Of course, it is easy to react reflexively that such an ideological premise is utopian, or confused, or absurd. Like Packer, I make no

amount of error that it will put up with" and "accepts the probability of mistakes up to the level at which they interfere with the goal of repressing crime." *LIMITS* at 164-65. See also *id.* at 116. Cf. 2 W. PALEY, *PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 302 (7th Eng. ed. 1790): "When certain rules of adjudication must be pursued . . . in order to reach the crimes with which the public are infected, courts of justice ought not be deterred . . . by the mere possibility of confounding the innocent with the guilty. They ought rather to reflect that he who falls by a mistaken sentence may be considered as falling for his country." Cf. G. WILLIAMS, *supra* note 12, at 131-33 (quoting Paley). Compare Holmes' similar views with respect to the substantive criminal law, discussed in note 178 *infra*. Contrast Pound's insistence on "concrete justice," p. 391 *infra*, and Devlin's observation that:

when a criminal goes free, it is as much a failure of abstract justice as when an innocent man is convicted. . . . [B]ut an injustice on the one side is spread over the whole of society and an injustice on the other is concentrated in the suffering of one man. . . . Since we know that the ascertainment of guilt cannot be made infallible and that we must leave room for a margin of error, we should take care to see that as far as humanly possible the margin is all on the side of the defense.

DEVLIN, *supra* note 37, at 135. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 *YALE L.J.* 319 (1957), suffers from the naive illusion that such ultimate questions can be settled "through the methods of reason and empiricism." *Id.* at 359.

Of course, the burden of error is only one form of "advantage"; but the same political judgment about where advantage ought to rest applies equally to other forms of advantage. Cf. materials cited in note 181 *infra*.

57. Goldstein, *supra* note 47, at 1152 (italics added).

58. Cf. Pound's "Puritan Model," note 110 *infra*.

claim of direct applicability for my alternative "model."⁵⁹ I should nevertheless induce the doubter to suspend disbelief, at least temporarily, by making the proposed alternative ideology as plausible as possible. So I propose to gather some respectability by using an allusive name for it: a name, that is, that invokes a "real world" institution which occasionally inflicts punishments on offenders for their offenses but which is nonetheless built upon a fundamental assumption of harmony of interest and love—and as to which no one finds it odd, or even particularly noteworthy, that this is the case. I will, then (following Packer in using the word "model" only for convenience' sake, and preferring to think of it as an ideological metaphor⁶⁰), offer a "Family Model" of the criminal process. I wish to emphasize, however, that this allusive reference is to our family *ideology* as I take it to be, not to the facts of all or particular families.

In what follows, it should be emphasized that I am talking about "punishment" in the strict sense which requires that it be exacted from an offender for his offense—not about things done for the good of the person concerned, nor about things done prophylactically for the good of society, and certainly not about things called "punishment" metaphorically because they share the element of unpleasantness.⁶¹ That "punishment" in this strict sense goes on in a family is plain. I spank my child for tearing my books, not because to tear them is bad for him, nor because he "needs to learn" about books, but because I and the rest of the members of the family don't want our books destroyed and want to accomplish that objective by appealing to our children's capacity for self-control rather than by taking preventive measures.⁶²

"Punishing" thus does go on in a family.⁶³ One could impose a con-

59. See LIMITS at 154.

60. As I indicated in note 14 *supra*, my discussion of Packer has produced a single basic principle from which his "models" could be generated. His models are the two possible systems derivable from his major premise of hostility, depending upon two different minor premises about how the rules of battle should be biased. Reinterpreting Packer this way, there is a sense of the word "model" in which its use here is not inappropriate.

61. See H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY (1968).

62. Methods of a prophylactic sort—such as keeping the would-be book-destroyer in his play-pen—may often be impractical or otherwise undesirable; but they, rather than punishment, are what we use if a child is too young for us to appeal to his capacity for self-control.

63. Cf. RESTATEMENT (SECOND) OF TORTS, §§ 150, 151 (1965); A.L.I. MODEL PENAL CODE § 3.08 (see also the Comment to this section in Tent. Draft No. 8 [1958], at 71, where the draftsmen assert that "safeguarding or promoting the child's welfare" is the test for parental privilege to use force on a child but assert that this includes "the specific pur-

ceptual "process" of adjudication and exaction upon the facts of family life if it seemed worthwhile. Although punishments are expected to and do come out of the family's adjudication process, it is not a bitter "struggle from start to finish."⁶⁴ A parent and child have far more to do with each other than obedience, deterrence, and punishment, and *any* process between them will reflect the full range of their relationship and the concerns growing out of it. Everyone expects and believes that whatever is done, it will be consistent with what the parent recognizes as the basic well-being of his child.

What, then, would be the general thrust of a Family Model?

The Changed Conception of Crime and of the Criminal. A thoroughgoing Family Model of the criminal process would be accompanied by a basic change of attitude toward "anti-social" behavior; the very vocabulary with which the subject is discussed would necessarily be affected. People operating within a process built upon the assumption of an ultimate reconcilability of interest between the state and the accused (and the convicted as well, of course), could not lose sight, while concerned with the criminal process, of the range and variety of relationships between the state and its citizens. Seeing "criminal" conduct in its essential variousness⁶⁵ and its inseparability from other social events, they would reflect this perception through their attitudes and behavior in the criminal process. They would be unlikely, that is, to think about or try to deal with "crime" or "criminals" in the isolated way which is characteristic of our criminal process because they would regard these categories as of very limited and specialized usefulness.

Under a Family Model, the entire concept of a "crime" would also be quite different. One could be expected to recognize quite explicitly the role of society in perceiving an occurrence as criminal deviance, and reacting to it accordingly, as of joint importance with the actual uncharacterized conduct of the "criminal" in producing "a crime."⁶⁶ This approach now prevails only among sociologists, who impose detachment on themselves by special discipline. For the rest of us,

pose of preventing or punishing misconduct"—which latter is the right *result* derived from a patently wrong *reason*).

64. *LIMITS* at 149.

65. See B. WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* 25-29, 70 (1939), for a discussion of the criminological distortions we produce by assuming (without so much as arguing the point) that only some of the conduct which offends against criminal proscriptions is really "criminal."

66. See K. ERIKSON, *WAYWARD PURITANS* ch. 1 (1966); H. BECKER, *OUTSIDERS* 8-14 (1963); Wheeler, *Criminal Statistics: A Reformulation of the Problem*, 58 J. CRIM. L., C. & P.S. 317 (1967).

it is very hard to adopt so balanced an attitude toward an enemy in a battle. What now derives from sociological discipline could equally well, it seems to me, derive from a genuine acceptance of the idea that criminals are just people who are deemed to have offended—that we are all of us both actual and potential criminals⁶⁷—that “criminals” are not a special kind and class of people with a unique relation to the state. So adherents to the Family Model would not talk (or think) about “offenders,” or “criminals,” or “people who commit crimes,” as if these words referred to people in any other aspect than their exposure to the criminal process.⁶⁸

It is important not to press this point too far. I do not think that there would be no place at all for a distinct concept of “crime” in a Family Model. There are good moral and prudential reasons for public non-interference in the lives of individuals. One might expect the reduction in artificial categories of thought to produce greater sensitivity than we now can muster to the insidious kinds of communal nosiness which we now tolerate only because they are not “penal.” Thus, we might expect more appreciation under a Family Model that one great advantage of the criminal law is the way it minimizes social intervention by limiting such intervention to situations in which an individual has failed to exercise the required self-control.⁶⁹ The same

67. See Buikhuisen, Jongman & Oving, *Ongeregistreerde Criminaliteit onder Studenten* [Unrecorded Criminality among Students], 11 NED. TIJDSCHRIFT V. CRIMINOLOGIE 69 (1969); and cf. Clark & Tift, *Polygraph and Interview Validation of Self-Reported Deviant Behavior*, 31 AM. SOCIOLOGICAL REV. 516 (1966). See also Radzinowicz, *supra* note 1, at 62-64, 129-30 (1966); REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 43-44 (1967).

68. These terms are all to be found in LIMITS. Barbara Wootton has observed of this tendency to speak and think about “criminals” as a special kind of people, that it is, time that we recognized that delinquency and criminality . . . is not a rational field of discourse. It takes all sorts to make a criminal world. If research serves only to confirm the old truth that ‘there but for the grace of God go I’, that is just what is to be expected. Nevertheless, the contrary belief dies hard . . . This faith in the overwhelming importance of criminality as a thing-in-itself has certainly had a stultifying effect upon the trend of research in this field. Ultimately it seems to have its roots in the implicit self-righteousness of those who range themselves, as it were, instinctively, on the side of authority. It expresses the characteristic, if unspoken, premises of what Marx would have called the ruling class, and what today has become known as the Establishment.

B. WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* 306 (1959). Cf. K. ERIKSON, *WAYWARD PURITANS* 196-99 (1966), attributing the same conceptual and linguistic tendencies to our inheritance from Puritan theology.

69. Thus I think Barbara Wootton's idea that we should focus exclusively—at the adjudicative stage—on the causation of a harmful result (leaving all questions concerning whether any failure of self-control was responsible for causing the result to a disposition stage) overlooks precisely what is special in the criminal law: its effort to accomplish social control by appealing to the capacity for self-control. She would eliminate the possibility of keeping this special mode distinct from other, utterly different, ways of approaching the problem of unacceptable behavior. B. WOOTTON, *CRIME AND THE CRIMINAL LAW* 32-57, 79-80 (1963). The criticisms levelled at Wootton—that her proposal

respect for the value of punishment as a method of control is characteristic of its use in the family. There, punishment in the strict sense is also part of an effort to secure the minimum conditions of social life by appealing to the capacity for self-control. The size and intimacy of a family permits this special function to succeed even in ambiguous situations. Punishment as a response to a failure to exercise the capacity for self-control can effect its purpose without being clearly denominated punishment and without being kept clearly distinct from the other things a parent does to or for a child. One may doubt whether this ambiguity is possible within a larger society. My hunch is that even a society which did not see criminal behavior as a discrete phenomenon, and which had little use for the notion that the word "criminal" describes a particular sort of person or the word "crime" an *a priori* category of behavior, would nevertheless find it essential to maintain some integrity in the idea of a "crime" and its "punishment"—enough to keep the concept of self-control and its culpable failures clearly in focus.⁷⁰ Thus I want to distinguish between the role of a concept of "crime" as a failure of expected self-control, consistent with the Family Model (in fact, a necessary condition of *any* system which imposes "punishment"), on the one hand, and the traditional concepts of "crimes" or "criminal behavior," and "criminals," as categories of events and persons, on the other. It is only these latter which, under a Family Model, should be expected to wither away.

In short, much of the special vocabulary and underlying assumptions which Packer (reflecting all of us rather well, I think) uses in discussing the criminal process, would undoubtedly seem cramped, or distorted, or simply irrelevant to a person thinking about it from the

involves treating men "merely as alterable, predictable, curable or manipulable things"—H.L.A. HART, *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY 158, 183 (1968), quoted in LIMITS at 76—are thus not applicable to a Family Model of the criminal process.

70. It is my belief, which I cannot try to develop here, that much of the General Part of the criminal law is a latent effort (which should be made manifest, coherent, and rational) to address the concept of the capacity for self-control and to distinguish situations of lack of capacity from situations of failure to exercise capacity. If this is true, a Family Model would need to maintain the concept of a "crime"—including all of the excusing conditions—in order to maintain a system premised upon appeals to the capacity for self-control; and things done as "punishment" would have to be kept plainly and intelligibly separate from things done for reasons other than a failure of self-control.

It seems that the special reasons for maintaining the concept of "crime" would necessarily be manifest to people thinking within a Family Model and that there would therefore be an inherent disinclination to use the criminal law for the delivery of social services—a practice eloquently deplored by F. ALLEN, *The Borderland of the Criminal Law: Problems of "Socializing" Criminal Justice*, in THE BORDERLAND OF CRIMINAL JUSTICE 1 (1964). [Allen's entire volume will hereinafter be referred to as ALLEN]. Contrast *Powell v. Texas*, 392 U.S. 514, 526-28 (1968).

perspective of a Family Model. Caught as we are in our present ideology and in our modes of speech which reflect it, it is difficult even to imagine thinking and talking as they would be if we accepted the assumptions of the Family Model. We can get glimpses, as I have suggested, by looking at our own behavior in family life itself.⁷¹ Offenses, in a family, are normal, expected occurrences. Punishment is not something a child receives in isolation from the rest of his relationship to the family; nor is it something which presupposes or carries with it a change of status from "child" to "criminal child." When a parent punishes his child, both parent and child know that afterward they will go on living together as before. The child gets his punishment, as a matter of course, within a continuum of love, after his dinner and during his toilet training and before his bed-time story and in the middle of general family play, and he is punished in his own unchanged capacity as a child with failings (like all other children) rather than as some kind of distinct and dangerous outsider. The ideology of family-life on the place of punishment is contained in the straightforward and simple reply a parent gives to a child who is anxious about the fundamental relationship because of his guilt at an offense or his reaction to its punishment: "Of course I *love* you, but just now I don't *like* you." A family is what it is, and punishment within a family seems to us as it does, because the ideology of the family permits such a reply.

The Lack of Conceptual Compartmentalization. One basic feature of the Battle Model ideology is the way it drives us to keep interconnected subjects separate and compartmentalized. To use my figure again, it is as if we were seeking desperately to keep the battle of the criminal process confined.⁷² Remove the central element of battle, and it seems that the inclination toward containment would vanish.

71. I have, for example, thought somewhat about whether we would have to expect an increasing prevalence of what Strawson calls the "objective attitude" toward offensive behavior. That is, an attitude directed to its causative antecedents, rather than to an assumed "responsible" agent. See Strawson, *Freedom and Resentment*, 48 *PROC. BRIT. ACAD.* 187 (1962). At first I thought we would expect this, and I was at some pains to worry about how, in such a case, we could expect preservation of the basic ideas of responsibility in the criminal law. Compare WOOTTON, *supra* note 69. But then it seemed to me that we preserve our moral reactive attitudes rather well in the family itself—that the Family Model is still a *punitive* process, although a non-hostile one—and so I do not feel it necessary to go into the issue further at this point.

72. For example, at the end of a passage arguing that a criminal trial is of necessity a formal battle (see note 177 *infra*) Stephen observes that, "one object of the rules of evidence and procedure is to keep such warfare within reasonable bounds, and to prevent the combatants from inflicting upon each other, and upon third parties, injuries, the inflicting of which is not absolutely essential to the purposes of the combat." 1 STEPHEN, *supra* note 40, at 432.

One finds this insistent drive toward compartmentalized thinking about criminal law and procedure all around, once one begins looking for it. Some subject-matters are seen as intrinsically not "criminal," without regard to their connection or lack of connection with any theory of what is special about criminal law. Why, for instance, do we emphasize the "product" rule and the requirement of "mental disease or defect" in the "insanity" defense?⁷³ Why, indeed, do we have such

73. See *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954); *State v. Jones*, 50 N.H. 369 (1871). The insanity defense as it has historically developed has been premised on the notion that there is a thing, whose name is insanity, which either exists or does not exist in a particular individual. The problem has been to identify it—once identified, it is thought more or less *a priori* to exclude the application of the criminal law (*Jones*), at least if it was "causally" related to the offense (*Durham*). The disturbing thing about this line of thought is that it starts with an alleged entity wholly extrinsic to the criminal law ("insanity") and imposes it as an *ad hoc* limitation on the scope of criminal law. See, e.g., Justice Frankfurter's dissenting opinions in *Leland v. Oregon*, 343 U.S. 790, 802 (1952), and (to a somewhat lesser extent) in *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950), which suffer from his refusal to make the essential decision, *why* do we have this special defense? Cf. also *Robinson v. California*, 370 U.S. 660 (1962), and *Powell v. Texas*, 392 U.S. 514 (1968), discussed in note 74 *infra*.

A. Dershowitz gives a lovely example of the same kind of compartmentalized thinking from the intimately analogous process of civil commitment. After describing one case of commitment and one of release, he observes:

There was no evidence that Yang was more dangerous, more amenable to treatment, or less competent than Williams. But Yang was diagnosed mentally ill and thus within the medical model, whereas Williams was not so diagnosed. Although there was nothing about Yang's mental illness which made him a more appropriate subject for involuntary confinement than Williams, the law attributed conclusive significance to its existence *vel non*. The outcomes in these cases—which make little sense when evaluated against any rational criteria for confinement—are typical under the present civil commitment process. And this will continue, so long as the law continues to ask the dispositive questions in medical rather than legally functional terms

The Psychiatrist's Power in Civil Commitment, *PSYCHOLOGY TODAY* (Feb. 1969), 43, 44.

The Family Model, lacking the need to compartmentalize and to keep the "sick" and the "criminal" in separate categories, would presumably start with the capacity for self-control and consider all grounds leading to impairment as of equal status. Impairment from starvation, see, e.g., *The Queen v. Dudley & Stevens*, [1884] 14 Q.B.D. 273, would be no different in its impact on criminal responsibility from impairment by "insanity." But cf. A. Goldstein's views *infra*.

See J. Goldstein and Katz, *Abolish the Insanity Defense—Why Not?*, 72 *YALE L.J.* 853 (1963), for a tentative step in the direction of a defense structured in terms of the objects of criminal law, rather than categories (like "insanity") imposed from without as boundary-maintaining devices. Cf. also 1 STEPHEN, *supra* note 40, at 168-86. Packer rejects this idea out of hand, preferring the notion that "insane" people are a kind of people to whom the criminal law ought not apply. *LIMITS* at 134-35 (Part I of the book). A. Goldstein acknowledges the functional anomalousness of the insanity defense, but defends it as a haven of subjective responsibility in a criminal law which must otherwise, for practical reasons, assign responsibility according to objective criteria. A. GOLDSTEIN, *THE INSANITY DEFENSE* 191-207, 221-226 (1967).

The traditional Frankfurter-Packer conception of the insanity defense receives its *reductio ad absurdum* in *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949), where the California Supreme Court sought to make sense of the state's bifurcated trial system for insanity cases. Evidence of mental impairment was admissible on the merits, the court held, because it may go to *mens rea*. But it may not be admitted for that purpose if it suggests insanity, because sanity is conclusively presumed at the first stage. The rule for California was said to be: "[I]f the proffered evidence tends to show not merely that he *did* or *did not*, but rather that because of legal insanity he *could* not, entertain the specific intent or other essential mental state, then that evidence is inadmissible under

a special defense at all? Why do so many judges seem to think that if something is a "disease" it must for that reason alone belong in the "treatment" rather than the "punishment" category?⁷⁴ Why all of this kind of effort to fix the limits of the "criminal" process with *a priori* categorical limits for which no one has ever found a really persuasive function, except that it is a battleground which we want kept as limited as possible and whose boundaries we need to maintain by constant patrolling?

Packer's article reflects another sort of compartmentalizing characteristic of the Battle Model: in his long discussion of criminal procedure, he clearly (if implicitly) excludes the stage of punishment from his subject. That which gives the Battle Model its distinctive character is what might be called the "exile" function of punishment.⁷⁵ Based

the not guilty plea and is admissible only on the trial on the plea of not guilty by reason of insanity." 33 Cal. 2d at 351, 202 P.2d at 66. There are few opinions which can compare with this one in its egregious failure to make any concessions whatever to an intelligible conception of what the criminal law is all about.

Barbara Wootton advocates the elimination of the artificial compartmentalization of the "insane", but she does this not in light of careful attention to the unique character of *criminal* law as a method of social control and how it ought to be reflected in a functional General Part, but rather in terms of her proposal to do away altogether with an institution of that character. See note 69 *supra*.

74. See cases cited in note 73 *supra*. In *Robinson v. California*, 370 U.S. 660 (1962), the Court held a statute punishing the status of addiction invalid, saying that addiction "is" an "illness," and that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667. There are two reasons for taking *Robinson* as a battlefield-defining case rather than a capacity-for-control case: first, some addiction is certainly a result of conduct subject to self-control—but the Court apparently put *all* addiction beyond the pale of punishment; second, if the non-punishability of addiction were based on its not being subject to control, one would suppose its necessary incidents would also be beyond the reach of the criminal law—but the Court expressly preserved the punishability of any actual *use* of narcotics. In short, *Robinson* seems to me best read as a confused attempt by the Court to state the notion that some things, because of their intrinsic status as "illness" rather than "crime," cannot be made objects of punishment. Given this underlying notion, the Court's reliance on the cruel and unusual punishment clause, otherwise mystifying, becomes comprehensible.

Powell v. Texas, 392 U.S. 514 (1968) makes an interesting contrast with *Robinson*. The Court refused to apply *Robinson* to the "crime" of being drunk in a public place—to do so, said the Court, would be to get into the question of tests of capacity for control, which is a matter for state law. *Id.* at 533-37. *Robinson* was explicitly treated as having nothing to do with capacity for control; it involved only the proposition that criminal liability must be based upon an act (which had been Justice Harlan's position in *Robinson*, see 370 U.S. at 678-79), not a definition of the minimum standard of criminal responsibility. *Id.* at 532-34. The Court seems to me to be obviously right that the real issue in *Powell* was capacity for control, although I would not have hesitated to hold that the federal Constitution restricts what the states can do by way of failing to give adequate content to the idea of responsibility. Cf. *Lambert v. California*, 355 U.S. 225 (1957). In *Powell*, Justice Fortas dissented on *Robinson* grounds—drunkenness, he argued, "is" a disease and hence its symptoms are not subject to the criminal law. 392 U.S. at 569. Cf. LIMITS at 79 (Part I of the book), where Packer says that whether something "is" a disease or not is just a matter of "how it is perceived," which seems to me to complete the circle of the anti-functional approach to the relationship of mental-illness to criminal liability.

75. I have borrowed this conception from Mead, *supra* note 36. The metaphor is a

upon the conception of the criminal as a special kind of person who is the "enemy" of society, and of the trial as a battle in which (if guilty) he is vanquished, the exile function of punishment cuts him off sharply at that point from the total community. The main purpose of penal institutions is to keep him out of sight and out of mind. Apart from some residual hostility, our attitude, after his conviction stamps him with his special status, is one of indifference to his fate.⁷⁰

I am here not so much concerned with the exiling function of punishment itself, however, as with the effect that the anticipation of such exile has upon the character of criminal procedure. This effect reveals itself in the curious dichotomizing which puts so wide a gulf between criminal law and procedure, and penology. To take its pedagogical manifestation as illustrative: courses in criminal law and procedure end with the final adjudication of guilt. Even so-called

bit mixed—"exile" and "battle"—which serves to show that the criminal law is a unique institution not readily analogized to others.

The notion of exile is illustrated in Orwell's description of an incident he witnessed during an attempt "to get into prison." The operator of a pub was arrested and brought to the jail cell in which Orwell was being held. He had embezzled the Christmas Club money of his patrons, intending to pay it back, because he was hopelessly in debt to his brewers. Upon discovery he paid back virtually all he had embezzled. Nevertheless, he knew he had to expect a stiff sentence (which he in fact later received).

He was ruined for life, of course. The brewers would file bankruptcy proceedings and sell up all his stock and furniture, and he would never be given a pub license again. He was trying to brazen it out in front of the rest of us, and smoking cigarettes incessantly from a stock of Gold Flake packets he had laid in—the last time in his life, I dare say, that he would have quite enough cigarettes. There was a staring, abstracted look in his eyes all the time while he talked. I think the fact that his life was at an end, as far as any decent position in society went, was gradually sinking into him.

G. ORWELL, *Clink*, in 1 COLLECTED ESSAYS, ETC. 86, 89-90 (1968).

Stephen, in this respect as in so many others, eschews the usual hypocrisy to make bluntly explicit the fundamental attitude which informs criminal procedure (and which he is not embarrassed to uphold):

[I]n my opinion, the importance of the moral side of punishment . . . is . . . the expression which . . . [punishment] gives to a proper hostility to criminals, [which] has of late years been much underestimated. The extreme severity of the old law has been succeeded by a sentiment which appears to me to be based upon the notion that the passions of hatred and revenge are in themselves wrong; and that therefore revenge should be eliminated from the law as being simply bad. . . . [These views] appear to me to be based on a conception of human life which refuses to believe that there are in the world many bad men who are the natural enemies of inoffensive men, just as beasts of prey are the enemies of all men. My own experience is that there are in the world a considerable number of extremely wicked people, disposed, when opportunity offers, to get what they want by force or fraud, with complete indifference to the interests of others, and in ways which are inconsistent with the existence of civilized society. Such persons, I think, ought in extreme cases to be destroyed.

2 STEPHEN, *supra* note 40, at 91. He also believed that "the proper attitude of mind towards criminals is not long-suffering charity but open enmity; for the object of the criminal law is to overcome evil with evil." *Id.* at 179.

76. The heavy-handed symbolism of prison life in this respect has been excellently described in G. SYKES, *THE SOCIETY OF CAPTIVES*, 3-8, 65-66 (1958).

"post-conviction remedies" deal with the question of legal guilt, and we do not generally teach *prisoners'* remedies, the law of corrections and of the rights of convicted persons, in such courses.⁷⁷ The often suffocating dose of the functional approach given in our law schools makes this non-functional teaching of criminal law and procedure particularly remarkable. No one, any more, would teach contracts without contract remedies. Holmes would go so far as to argue that the two are essentially the same.⁷⁸ But no one has yet argued that the law of punishment is the law of crime. The exile function and our lack of interest in what follows conviction leave criminal lawyers as the only remaining representatives of the quintessential pre-legal-realist lawyer, who can think about one thing which only has meaning in connection with another, without thinking about the other.⁷⁹ Of course, it is not just that we do not *teach* the "law" of punishment. There is virtually no such law of criminal remedies. It is our involvement with the Battle Model ideology which accounts for both this state of the law and our passive acceptance of it in the law schools. By contrast, in the Family Model, where no exile would take place, no strict line of demarcation would be drawn at the point of conviction. The process, like the continuing concern for the accused or convicted man, would be a whole.

Changed Attitudes Toward the Participants in the Process. What other implications would follow from a Family Model? For one thing, that ideology would necessarily be accompanied by a basic faith in public officials; everyone would assume, as a general matter, that if a public official has a particular role or duty, he can be expected to carry it out in good faith and using his best judgment. The Family Model could not exist without such confidence. Absent the notion of absolute irreconcilability of interest between the state and the individual, no *a priori* obstacle would preclude it.

Basic faith in public officials would revolutionize American criminal procedure. We are all used to the proposition that legal procedures—indeed, the organization of government in general—must be designed with the bad man, or the man who will unwittingly misuse his powers,

77. Cf. S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES*, ch. 15, § B ("Post-Conviction Remedies") (2d ed. 1969); L. HALL & Y. KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE*, Ch. 27 ("Habeas Corpus and Related Post-Conviction Remedies") (3d ed. 1969).

78. See, e.g., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897); *THE COMMON LAW* 301 (1881).

79. Cf. T.R. Powell, quoted in Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 58 (1930).

primarily in mind.⁸⁰ In a sense, we have begged the central ideological question when we define the problem we see as having to do with *power*, and thereby almost necessarily with its potential abuse.⁸¹ Our

80. While commenting (on the whole very favorably) upon the *Indian Penal Code*, drafted largely by Macaulay, Stephen makes a characteristically acid and suggestive remark on this topic:

The idea by which the whole Code is pervaded, and which was not unnaturally suggested by parts of the history of the English law, is that every one who has anything to do with the administration of the Code will do his utmost to misunderstand it and evade its provisions; this object the authors of the Code have done their utmost to defeat by anticipating all imaginable excuses for refusing to accept the real meaning of its provisions and providing against them beforehand specifically. The object is in itself undoubtedly a good one, and many of the provisions intended to effect it are valuable as they lay down doctrines which may be needed in order to clear up honest doubts or misunderstandings

I think, however, that to go beyond this, and to try to anticipate captious objections, is a mistake. Human language is not so constructed that it is possible to prevent people from misunderstanding it if they are determined to do so, and over-definition for that purpose is like the attempt to rid a house of dust by mere sweeping. You make more dust than you remove. If too fine a point is put upon language you suggest a still greater refinement in quibbling.

3 STEPHEN, *supra* note 40, at 305-306.

81. See LIMITS at 5 (Part I of the book) (quoted in note 15 *supra*), 166; ALLEN, *supra* note 70, at viii, 20, 35-36, 89-90, 126-27. I say it begs the question, not because the matter of power is unimportant, but because putting it at the center of concern, as Packer and Allen do, necessarily fixes the whole ideological tone of a conception of criminal procedure. We would not, I think, be inclined to start out that way with respect to the family, because our family ideology does not conceive of the question of power and its abuses as the first and dominating question to be asked (although it does not rule it out of consideration).

The whole idea of our criminal process as a bulwark against oppression is a peculiar one. Cf. Hall, *Objectives of Federal Criminal Procedural Revision*, 51 Yale L.J. 723, 728 (1942); Currie, *Crimes without Criminals: Witchcraft and its Control in Renaissance Europe*, 3 LAW & SOC. REV. 7 (1968). If it asserts more than the tautology that good procedure is a bulwark against the oppressiveness of bad procedure, I do not know that there is much evidence for it: do prospective oppressors actually find a criminal procedure system much of a barrier? how many "accusatorial" systems (the "bulwark" idea is usually presented as an argument in favor of such a system) have co-existed with oppression? Glanville Williams contends that contrary to the general myth, the jury system never was much of a protection for political defendants. G. WILLIAMS, *supra* note 12, at 196-97. But cf. *id.* at 199. The same is probably true of the rest of the bulwark idea. I think we probably ought to regard the act of the courageous judge or juror as more a political than a legal obstacle to oppression.

Furthermore, the argument against effectiveness on the ground that a bad man could abuse it is a tricky one. (Of course, we would not need the bulwark argument unless a proposed reform were more effective, in some sense.) We would have to distinguish the criminal law from a highly-developed telephone and telegraph network, a modern police force, an efficient bureaucratic system, and the like; nobody I know of argues against telegraph stations because they are seized first in a coup. There undoubtedly is something to be said for ineffectiveness, cf. E. LUTTWAE, *COUP D'ETAT: A PRACTICAL HANDBOOK* (1968); decentralization, community control, federalism, and the like are all, to some extent, instances of its desirability. But in criminal law, sophisticated arguments for it never seem to be deemed necessary; even Allen is content to rely on some tiresome old clichés as substitutes for thought: "the due process concept" is now recognized to be "more than outmoded ritual or a lawyer's quibble" in the juvenile process, "because we all—lawyers and non-lawyers alike—have seen enough of the twentieth-century world to render untenable any assumption of the inevitable benevolence of state power," ALLEN, *supra*, at 20. But if the process is thereby made less effective (which I doubt, but which is a necessary premise for argument), the rhetorical response is obvious: we have also seen enough to render untenable any assumption of the inevitable *malevolence* of state power.

assumption that the state and the individual are in battle compels us to believe that any "discretion"—any active responsibility going beyond the umpiring role of a judge—will necessarily be exercised either on behalf of the individual's interest or on behalf of the state's. We see only Packer's two poles as the possible outcomes of discretion.⁸²

Inevitably our starting assumption defines the object of our investigation and thereby affects the facts which we uncover. We conclude that we are right to suspect any man who wields power. But anyone who has discussed the question with a lawyer from a country which traditionally trusts its public servants more than we do, will have found himself shaken in his American cynicism by the direct and almost incomprehending answer he receives to his suggestion that we must always expect abuse of power—willful or mindless or misguided—by the man who is charged with wielding it: "Yes, but why *should* he?" Differences in this most fundamental kind of reaction separate systems of criminal procedure so radically that useful communication across the gulf between them is nearly impossible; and an endless stream of misunderstandings has resulted.⁸³ In every system, ideological assumptions work as self-fulfilling prophecies.⁸⁴ Thus officials of the criminal law system seem to do their jobs competently and fairly on the whole in countries which manifest confidence in them, whereas in the United States each

82. Packer himself asserts that "discretion is simply . . . lawless, in the literal sense of that term." *LIMITS* at 290 (Part III of the book). It is clearly his belief that there is no possible common, reconciling sense of "interest" in the name of which discretion can be used. Hence the necessity to ensure that *which* interest is to be favored be fixed by rule, not left to *ad hoc* decisions of public officials.

83. Failure to be aware of and come to terms with the role of ideology seems to me to be the single most responsible factor in the low estate of comparative criminal law. At worst, we use the concept pejoratively and unilaterally with respect to systems of which we do not approve (they are based on "ideological" premises—rather than, presumably, factual or "neutral principled" premises). What we usually do not undertake is to understand another system's features in light of the basic assumptions and expectations of its participants—an undertaking which is impossible unless we first acknowledge and maintain intellectual control over our own ideological preconceptions. I have sat through many sessions with foreign lawyers in which the American participants simply did not believe what they were told about the functioning of another system (e.g., that plea bargaining is unknown) because it did not fit within their conception of how a criminal process necessarily operates. I know that the reverse is also true, and that foreign lawyers have a difficult time accepting as fact some of the most characteristic features of our process. Beyond the level of factual misunderstanding, ideological unself-consciousness diminishes our capacity to acquire any feel for another system, any ability to evaluate its responsiveness to the needs and desires of its participants or to understand its workings and its inner tensions so that we can gauge the potential and probable directions of development. We cannot, in short, understand another system as Packer's analysis enables us to understand our own until we can perceive and adopt, at least temporarily, its fundamental "model" of the process.

84. Cf. G.K. Chesterton's remark, quoted in FRANK & FRANK, *supra* note 40, at 248-49, "[T]he horrible thing about public officials, even the best . . . is not that they are wicked . . . not that they are stupid . . . it is simply that they have got used to it."

new glimpse behind the veil of "legality" reveals unspeakable horrors and abuses.

Just as a change in assumptions concerning the relation of the individual to the state would be accompanied with new attitudes toward officials who act in the name of the state, so also would it require new attitudes toward the agents of the individual, that is, toward defense counsel. So long as the state's interest is solely "to put a suspected criminal in jail,"⁸⁵ the suspected criminal's corresponding interest, almost necessarily, is simply to stay out of jail. The roles of prosecutor and defense counsel are thereby defined. The competing concerns of efficiency and abuse of power affect the size of the role defense counsel is allowed to play but not the nature of that role.⁸⁶ Defense counsel should do for the accused what the accused could do for himself if he had legal training. He is not expected to concern himself with whether the accused is in fact guilty, nor with any interest of the accused beyond that defined by the process—to win his case, to avoid exile.⁸⁷

I doubt that a Family Model outlook on the process would involve less reliance on counsel, since there are good reasons for an adversary process which have nothing to do with irreconcilability of interest.⁸⁸ Certainly though, a process which is not primarily a "struggle from start to finish"⁸⁹ will require a defense counsel role which is cooperative, constructive, conciliatory. Together with the representative of the state, defense counsel would direct his energies toward assisting the tribunal to come to that decision which best incorporates and reconciles the interests of all concerned.⁹⁰ He could hardly be unconcerned with whether his defendant was actually guilty and with enabling the tribunal to reach an appropriate judgment on that question since the defendant's own interest depends upon this, among other factors.⁹¹

85. LIMITS at 151.

86. See LIMITS at 171-72, 236-38.

87. It is this objective which determines the reputation of defense lawyers. Cf., BIRKETT, *supra* note 41, at 20 ("the wonderful verdicts he won from juries"), and at 43 ("won a verdict of not guilty" when "no other counsel in England at that time could have done it").

We are all a bit ambivalent as between Crime Control and Due Process values and tend therefore to entertain opposed prejudices about defense counsel simultaneously. Popular culture reflects this ambivalence. The defense lawyer is alternately a culture hero and a cunning shyster. Cf. A. Goldstein, *supra* note 47, at 1150.

88. See *Professional Responsibility: Report of the Joint Conference of the American Bar Association and the Association of American Law Schools*, 44 A.B.A.J. 1159 (1958).

89. LIMITS at 149.

90. To some extent we already have this conception of counsel's role in civil cases. See *Professional Responsibility*, *supra* note 88, at 1161-62.

91. I am leaving aside, for present purposes, the theoretical possibility (seriously argued by a former student of mine; cf. also ALLEN, *The Juvenile Court and the Limits of Juvenile Justice*, in ALLEN, *supra* note 70, at 52), that an accused might find his true

An analogous change in our attitude toward criminal defendants would bring with it a thoroughgoing respect for their rights and their dignity and their individuality, going far beyond the purely formal respect which now attaches to the defendant in his role as party to a tournament. This different attitude would be part of the Family Model ideology not only because an offender would be perceived first and fundamentally as a *person*, rather than as a member of the special category of "criminals," and because treating *people* with respect would be among the substantive goals a Family Model process would seek to promote—not an extrinsic value for which sacrifices of "efficiency" are made. Respect and concern would be a fact in the process, not something stimulated artificially for the promotion of some other end—such as the risk that an accused might turn out to be innocent. Our own criminal process operates on quite a different basis. For example, in the *Armstead* case, the trial judge insisted that the prosecutor address the defendant by his first name alone, rather than as "Mr. Armstead." The Court of Appeals for the District of Columbia held that this was improper. Why? Because the man was not yet convicted, so must be "presumed" (*i.e.* "treated as if") innocent, or in other words, respectfully.⁹² Only Judge Edgerton, concurring, observed that the "presumption of innocence" should be irrelevant, because all men, accused, innocent, or convicted, are entitled to be treated with respect.⁹³ The Canons of Professional Ethics afford another illustration of our purely instrumental attitude toward a defendant's rights under the Battle Model ideology. Canon Five derives the lawyer's right to defend any accused person, no matter how unsavory, from the concern that "otherwise innocent persons . . . might be denied a proper defense."⁹⁴ Again, among the standard arguments for the exclusionary rules attached to the Fourth and Fifth Amendments is the necessity to find effective

interest served by a system which did not forbid what we now denominate as serious "crimes." First, I doubt that unrestrained license to kill (and be killed), for example, is "good for" anyone, in any significant sense. Second, what is "good for" a person must be taken in the context of a social decision by the rest of us to forbid and prevent killing; in that context, a defendant's "interest" surely includes the ability to refrain from killing, and his lawyer should be concerned with whether he killed in the past as an indication of his need (that is, what is "best for" him) for assistance in developing better control of his behavior.

92. *Armstead v. United States*, 347 F.2d 806 (D.C. Cir. 1965). The courts' use of the phrase, "presumption of innocence" was ambiguous. The court may have had in mind considerations of judicial propriety (not giving the appearance of pre-judgment) or of fairness (not affecting the fact-finding process) rather than the presumption of innocence itself. See F. Le Poole, *Some Thoughts on the Presumption of Innocence*, 1968 (unpublished paper).

93. 347 F.2d at 807-808.

94. ABA CANONS OF PROFESSIONAL ETHICS, No. 5 (*italics added*). Cf. E.B. WILLIAMS, *supra* note 37, at 27.

means of protecting *the innocent*⁹⁵—one sometimes wonders how much remains of the idea that guilty defendants, too, are entitled to have the integrity of their persons and homes protected. Concern for the guilty—for the vast bulk of those exposed to the criminal process—does not have a comfortable place in our ideology.⁹⁶

It is not difficult to see the main outlines of the patterns of attitude and behavior toward defendants which differentiate criminal law and procedure according to the Battle Model from the analogous institutions within a good family. Even though we all know in an abstract way that offenses happen regularly and for all kinds of understandable and forgivable reasons, and even though most “offenders” are not caught, and even though all of us are ourselves offenders,” frequently for rather serious offenses,^{96A} we nevertheless persist in thinking of a convicted person as a special sort of individual, one cut off in some mysterious way from the common bonds that unite the rest of us. To this rather arbitrarily selected group, we purposefully attach “stigma.” The more perceptive and candid of us go so far as to recognize that the criminal process is a form of “status degradation ceremony.”⁹⁷ We know, the accused knows, the other parties to the process know, and all onlookers know that if the accused loses, he becomes another

95. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955). But cf. *Marchetti v. United States*, 390 U.S. 39, 51 (1968). Cardozo and Wigmore gave the classic Crime Control Model reply to this justification for exclusionary rules which also benefit *the guilty*: “The criminal is to go free because the constable has blundered.” *People v. Defore*, 242 N.Y. 13, 21; 150 N.E. 585, 587 (1926), *cert. denied*, 270 U.S. 657 (1926); “Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.” 8 WIGMORE, EVIDENCE § 2184, at 40 (3d ed. 1940). Holmes, curiously enough for a man whose life was so heavily influenced by the metaphor of battle, could rise above it and entertain a conception of government, in its prosecutorial aspect, which (while not of a Family Model sort) did not cast government merely in the role of enemy to the criminal classes, and which appreciated the substantive effects of procedure. See his famous dissent in *Olmstead v. United States*, 277 U.S. 438, 469 (1928).

96. Miserable treatment, it is often impliedly conceded, is permissible for those we may properly deal with as guilty. See, e.g., FRANK & FRANK, *supra* note 40 at 183, deriving the objection to police brutality from the argument that to tolerate it is to let the police decide who is guilty. The standard denial-of-due-process police brutality case rests on the same peculiar ground, when what we ought to say is that torture is outrageous *even if* the victim is guilty of some crime. Cf. *United States v. Price*, 383 U.S. 787 (1966). From this point of view, the Franks' book *NOR GUILTY* reveals distinctly Battle Model-ish sentiments by cumulating stories of conviction of the innocent. Equally effective books can be written concerning the conviction of the guilty. Cf. T. PARKER, *FIVE WOMEN* (1965), and *THE UNKNOWN CITIZEN* (1963).

96A. See note 67 *supra*.

97. J. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, Appendix I at 590 (1960). Naturally, having imposed a kind of non-spatial exile as a part of the punishment for an offense, we then (in the name of rehabilitation) must worry about the return trip; hence the recent manifestations of concern for the removal of stigma through what Goldstein calls “status elevation ceremonies,” e.g., expungement statutes.

sort of person. Hence, I think, the special air of desperateness so characteristic of Battle Model trials. The accused and his champion are fighting for his right to remain a member of the common society—not to be treated as an outcast. That is what is at stake.⁹⁸ In short, we could sum up the difference in attitude toward the accused which separates the Battle from the Family Model in terms of their respective contemplation and noncontemplation that, if convicted, he will suffer a fundamental breach in the ties of love, respect and concern that normally bind members of a society to one another.⁹⁹

98. Judge Bazelon recently observed of the federal 10-year minimum sentence for narcotics recidivists, as applied to an addict: "The congressional response to this tragic history is to order the victim out of sight and presumably out of mind for the next decade." *Watson v. United States*, No. 21, 168, at 5 (D.C. Cir. Dec. 13, 1968), *vacated*, April 18, 1969.

Although it has its roots in attitudes, the outcast status that defendants fear is more than a matter of "stigma"; the degradation is physical as well as moral. We exile our convicts, and having done so *we cease to care*, as our sentencing practices and our penal facilities testify with adequate eloquence. See, e.g., REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 142, 159 (1967). It seems to me that we do not fully comprehend the horror of our penal practices because we regard imprisonment and the exile status of convicts as part of the natural order of things—much as the Eighteenth Century accepted the fundamental situation in debtors' prisons because no one could imagine life without them. Cf. *Reports of the Select Committee Appointed to Enquire into the State of the Gaols of this Kingdom*, 8 PARL. HIST. ENG. 706, 803 (1729, 1730). Mary McCarthy has captured very well the way in which a dogma of inevitability numbs the humane sensibility. M. MCCARTHY, *VIETNAM* 101-02 (1967).

99. The idea of the Family Model seems to me consistent with recent sociological speculation concerning the role of "deviance" in society. See K. ERIKSON, *WAYWARD PURITANS* ch. I (1966). Erikson argues that "deviance," far from being a fact which the criminal processes of a society simply register, is a perception and declaration by a society of its moral boundaries, that is, the point at which behavior threatens the integrity of the community. Hence deviance is most perceived at those places where the community's need for moral self-definition is greatest. To some extent of course, this theory requires us to look at an offender as an "outsider"—one who, by his behavior, has become no longer "one of us." It might be easy to move from there to the conclusion that the criminal law necessarily involves moral exile. I think that is a non-sequitur: the theory is that the *perceived criminal act* makes the person *pro tanto* an outsider; it does not follow that the *processes of the criminal law* must ratify and emphasize the breach and make it permanent. It would be at least as logical to expect them to concentrate primarily upon reintegration. That is what we try to do in a family. Erikson's theory does not preclude us from making the same attempt in society, although he gives a special explanation for why the Puritans, whom he treats, did not themselves do so (and argues that our conception of the "criminal" as a permanent role derives from their theology, see note 68 *supra*). But cf. Mead, *supra* note 36, at 577. Mead's theory is confusing, because he presents the exile function of punishment as virtually inescapable, *id.* at 586-89, but yet is enthusiastic about the juvenile court precisely because it escapes (he believed) the evils of an exile system, *id.* at 594-96. He also speaks of the possibility of an alternative, for the function of promoting social cohesion, to the criminal process' identification and punishment of social "enemies," *id.* at 594. Cf. also W. BONGER, *CRIMINALITY AND ECONOMIC CONDITIONS* 81 (Turk ed. 1969), for the proposition that we can make clear to "the criminal, from the manner in which he is treated . . . that those who have him in charge wish him well, are trying to improve him" while insisting "that his act was wicked and intolerable."

The Battle Model would, at its extreme, preclude the institution of *punishment* altogether. The effectiveness of punishment depends upon its symbolic message, and that depends upon the existence of a moral relation between society and its members. In a

The Effect of of Ideological Change on the Questions that Are Asked about Criminal Procedure. As the above discussion has illustrated, any ideology has particular effect and importance with respect to those issues to which it gives special relevance or to which it concedes no place. Thus concern for what, speaking broadly, is "good for" a defendant caught up in the criminal process is central to the Family Model; the question, except in the narrowest sense in which the defendant's sole interest is to win, is so thoroughly excluded by the Battle Model that even to raise it seems not only a sign of distressing lack of sophistication, but also in some subtle way embarrassing. For example, in all of the endless discussions of bail and pretrial detention of the last few years, I am aware of no serious attention having been given to the possibility that pretrial detention might not at least arguably be desirable from the typical defendant's point of view. Most persons accused of serious crimes are ultimately convicted, and the proportion could be made very high indeed with a few changes in the preliminary hearing procedure. An accused person may be unlikely to be successful in finding or retaining a job pending trial. If pretrial detention were deductible from any subsequent sentence, it might in many ways be quite an advantage for an accused to have served a goodly part of his sentence prior to conviction. Whether or not, and subject to what qualifications, one might be persuaded by such a consideration is plainly a very difficult matter; but what is important to me here is that I am unaware of any significant investigation into the factual assumptions upon which it would rest,¹⁰⁰ which is especially remarkable given the intensity with which the bail question has recently been fought. The reason, I believe, is that the Battle Model defines the question out of existence. The defendant's interest is *only* to resist the imposition on himself of any State power.¹⁰¹ The Due

relation of mere warfare, "punishment" is only an evil to be avoided; suffering it carries no connotation (to the defendant, if it is only he who has been made a complete outsider, and to the population as a whole, if the state of war is general) that there was anything *wrong* in the behavior engaged in. At most it was foolish. This phenomenon has been well described by Malcolm X, in his *AUTOBIOGRAPHY* (1965). Thus, to some extent the Family Model's idea of a continuing relationship is essential to the very idea of a *society* engaging in punishment, for absent that idea and its implementation, we have no society at all—no moral cohesion finding its expression and its maintenance in the criminal process. Cf. BONGER, *supra*, at 21-22.

100. A. Dershowitz has laid out the analytic structure within which such research ought to proceed, albeit from a perspective quite different from that which I am suggesting here. See his testimony, *Hearings on Amendments to the Bail Reform Act of 1966 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., at 172 (1969); and Dershowitz, *Preventing "Preventive Detention,"* N.Y. REVIEW OF BOOKS, March 13, 1969, at 18.

101. The effect of the Battle Model ideology upon the perception of relevant issues

Process and the Crime Control Models agree and there is therefore no room in Packer's "spectrum of normative choice" for a contrary consideration. It could be genuinely entertained (and, perhaps, as genuinely rejected) only by those whose ideological assumptions permit a more spacious conception of the interest of accused persons.

The same ideological block seems to account for the almost complete lack of research into the effect upon accused persons of various procedural arrangements, particularly those which are so fundamental that they are part of what we know as "due process." Quite apart from the Due Process Model concerns which account for the existence of these procedures, surely they have all sorts of consequences for those exposed to them. Nevertheless, even in the case of the juvenile court where the self-conscious decision to act only in the "best interests" of children might have been expected to stimulate some scientific interest in such questions, sophistication never—until very recently¹⁰²—got much beyond the prejudice that informality is good for children and formality is bad. Only when a question seems relevant to the kinds of issues which an ideology acknowledges will it even be asked, let alone taken up for serious study.

The Changed Conception of the Substantive Functions of the Criminal Process. The Battle Model ideology cuts off inquiry into the effects of procedure upon defendants not only by imposing a narrow definition

has been especially strong in the case of bail. One surely would have expected a great deal of law and lore on the conditions of pre-trial detention since they affect every non-bailable defendant and every defendant who cannot make bail. Yet there is virtually none. Foote's *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 1125, 1149-46 (1965) is one of the very few articles which goes beyond discussion of the right to release and treats the conditions of confinement when bail is unobtainable. No one has really advanced the subject beyond where Blackstone left it, 4 COMMENTARIES 300 (1758). There are almost no cases. I have talked to several people who were centrally involved in important bail reform projects and they seem never to have thought about what happens to non-bailed people (except insofar as they could use it as pro-bail ammunition). In the debate on pre-trial preventive detention, practically no attention has been given to the *conditions* in which such detention would take place. See, e.g., *Hearings*, *supra* note 100. But almost every one of the concrete evils of pre-trial detention which has been among the bases for the argument for release and against pretrial preventive detention is at least substantially alleviable if attention were directed to setting sensible restrictions on the conditions of detention. What, except the peculiar limitations of the Battle Model's approach to these things, could possibly account for the tunnel vision that bail reformers have suffered from?

102. In *In re Gault*, 387 U.S. 1 (1967) the Supreme Court felt called upon to deal with the traditional claim that the privilege against self-incrimination is therapeutically undesirable in juvenile cases. In the absence of any empirical information on the subject, or any discussion of the relevance of such information to the constitutional question before it, the Court simply implied that the empirical findings of social scientists supported its decision in favor of the privilege (this was not the case). *Id.* at 51-52. The Court's apparent interest in having social science information to buttress its opinions, as reflected in *Gault*, has provoked some investigations into juvenile court phenomena;

of the "interest" of a defendant, but also by imposing a narrow conception of the "substantive" functions of criminal procedure. The only relationship between procedure and substantive functions which it contemplates is that of procedural "efficiency" in stamping out the offenses defined by the substantive criminal law, subject to some limitations in the name of Due Process concerns. It is of the essence of the Battle Model, as Packer exemplifies, that the substantive criminal law and its procedural implementation are conceived of as entirely distinct, the one addressed to deciding what behavior ought to be suppressed, the other to how to do it.¹⁰³ Thus, for instance, we have the traditional belief of academic lawyers of a Due Process Model persuasion that judicial activism with respect to procedural questions does not offend against the doctrine of separation of powers because it leaves the legislature's exclusive substantive capacity intact.¹⁰⁴

Packer to the contrary notwithstanding, no list of the justifications for criminal prohibitions and punishments necessarily gives us the sum total of the substantive functions which should determine the shape of the criminal process. By contrast to the Battle Model, it is central to the Family Model that the function of the process involves far more than suppressing certain offenses. When I punish a child for tearing up my book—even if the "offense" is defined strictly for my own benefit—I can make the process one which accomplishes a variety of other things. I can design the process not only for effective prevention, but also to make me feel grand. Some of the features of our criminal process, trial by jury for example, have roughly analogous and often by no means trivial functions.

One particularly important substantive function with reference to which any institution can be designed is its educational impact upon those exposed to it. Children, defendants, and everyone else, learn both from the *objective* of a process they participate in and from the *nature* of the process. Robert Dreeben has recently written about the pedagogical effects of the structure of a schooling environment, as distinguished from the effects of the instructional content of the school's curriculum

but only one of these, so far as I know, has addressed itself to the differential effects on the juvenile of variations in procedural arrangements. See Lipsitt, *The Juvenile Offender's Perceptions*, 14 CRIME & DEL. 49.

103. Compare Hall, *supra* note 81, quoted and discussed p. 409 and notes 172, 173, & 180 *infra*.

104. See, e.g., Kadish, *supra* note 56, at 359. Compare Harlan, J., concurring and dissenting, in *In re Gault*, 387 U.S. 1, 65, 70-71 (1967), recognizing the inseparability of the characteristics of the process from the substantive goals of the juvenile court, but insisting nonetheless upon the judiciary's special competence and responsibility in procedural matters.

(taken broadly to include such things as "citizenship" which are self-consciously "taught").¹⁰⁵ His thesis, with "defendant" substituted for "pupil" and "the criminal process" for "teachers" (this should really be "schools"), is precisely what is central to the Family Model conception of the relation of process to substantive functions in criminal procedure:

Whatever pupils learn from the didactic efforts of teachers, they also learn something from their participation in a social setting some of whose structural characteristics have been briefly identified. Implicit in this statement are the following assumptions: (a) the tasks, constraints, and opportunities available within social settings vary with the structural properties of those settings; (b) individuals who participate in them derive principles of conduct^[106] based on their experiences coping with those tasks, constraints, and opportunities; and (c) the content of the principles learned varies with the nature of the setting. To the question of what is learned in school, only a hypothetical answer can be offered at this point: pupils learn to accept social norms, or principles of conduct and to act according to them.¹⁰⁷

To conclude this discussion: The Battle Model, as illustrated in Packer's writing, involves a very narrow conception of what the functions of the criminal process encompass. The shape of the process is deter-

105. Dreeben, *The Contribution of Schooling to the Learning of Norms*, 37 HARV. EDUCATIONAL REV. 211 (1967).

Educational theorists, like those who think about criminal procedure, have apparently concentrated in the past upon subject-matter content and pedagogics: What the "point" of the enterprise is, and how to achieve it. "[T]he preoccupation with instruction has been accompanied by the neglect of other equally important problems . . . what pupils learn is in part some function of what is taught; but what is learned and from what experiences remain open questions." *Id.* at 212.

The various parallels to criminal law in this article are fascinating. For example, Dreeben observes that while schools do have unique functions, instruction is not one of them. He then comments: "Perhaps the inconclusiveness of research designed to measure the impact of teaching on learning is attributable in part to the fact that many social agencies other than schools contribute to the acquisition of similar knowledge generally thought to fall largely within the school's jurisdiction." *Id.* This is also precisely the heart of the problem of defining and measuring the "deterrent" effect of the criminal process and punishment.

106. I would not limit the theory so narrowly, since individuals may learn many other things too; but Dreeben is specifically concerned in his article with the learning of "norms."

107. Dreeben, *supra* note 105, at 213-14. This theory should not be limited to pupils (defendants): teachers and administrators also learn from the social structure of schools, as do judges, prosecutors, and defense lawyers from the criminal process. The public at large does so too. Herein lies the self-fulfilling aspect of so many Battle Model assumptions about the "inevitable" nature of the process. We have processes based on those assumptions, and these processes teach us to think and act accordingly. This makes us incapable of imagining or working within other processes requiring different assumptions. We once tried to escape this vicious circle with the juvenile Court movement. I discuss the resulting failure below.

mined by its object alone, which in Packer's case—though perhaps this is not necessary to the Battle Model—is substantially limited to the efficient meting out of deterrence and retribution.¹⁰⁸ The Family Model, even if one accepts a narrow definition of the justifying object of criminal proscriptions, is concerned with what the *nature* of the process accomplishes as well as with the process' fitness to achieve its *object*. Process can accomplish and be justified by larger concerns than the narrow object for which it is established.

C. *The Family Model and Roscoe Pound*

Many of the themes presented in the preceding pages play at least implicit roles in Roscoe Pound's essay, *Criminal Justice and the American City*,¹⁰⁹ written as part of the Survey of the Administration of Criminal Justice in Cleveland, of 1922. I think it is useful to bring my discussion of the Family Model and the Battle Model ideologies to a close with an examination of the themes as they appear in Pound's essay.

Pound begins with the proposition that the problem of power in the criminal law is a contingent, not a necessary one. He observes of "our Puritan forbears" that they "abhorred subordination of one man's will to another's"; seeing laws as "guides to the conscience of the upright man," they "believed that if laws were inherently just and reasonable, they would appeal to his conscience as such, and secure obedience by their own moral weight."

This mode of political thought, well suited to the needs of a small group of God-fearing men founding a commonwealth in a new world, is ill suited to the needs of the enormous groups of men of all sorts and conditions who jostle each other in the city of today. There, law must be more than a guide to conscience. There, men will not take time to consider how the intrinsic right and justice of the law appeal to their consciences, but in the rush and turmoil of a busy, crowded life, will consider offhand how far the law may be made an instrument of achieving their desires. There, good laws will not enforce themselves, and the problem of enforcement becomes no less urgent than the problem of providing just laws.¹¹⁰

108. LIMITS, Part I.

109. POUND, *supra* note 42, at 559.

110. *Id.* at 560-61; *cf. id.* at 584. The passage quoted in the text is particularly interesting because it suggests a fourth Model: in addition to the two halves of the Battle Model (enforcement based on an assumption of hostility), and the Family Model (enforcement based on an assumption of reconcilability), there is the truly radical Puritan Model (no enforcement at all). The accuracy of Pound's history is not of present concern to me; his belief in the *possibility* of such a system is.

From this contingent analysis Pound derives his conception of the state of "internal opposition" in criminal procedure, which corresponds closely to Packer's Two Models, and to the competing interests involved in A. Goldstein's "balance of advantage":

The most insistent and fundamental of social interests are involved in criminal law. Civilized society presupposes peace and good order, security of social institutions, security of the general morals, and conservation and intelligent use of social resources. But it demands no less that free individual initiative which is the basis of economic progress, that freedom of criticism without which political progress is impossible, and that free mental activity which is a prerequisite of cultural progress. Above all it demands that the individual be able to live a moral and social life as a human being. These claims, which may be put broadly as a social interest in the individual life, continually trench upon the interest in the security of social institutions, and often, in appearance at least, run counter to the paramount interest in the general security. Compromise of such claims for the purpose of securing as much as we may is peculiarly difficult. For historical reasons this difficulty has taken the form of a condition of internal opposition in criminal law which has always impaired its efficiency. As a result there has been a continual movement back and forth between an extreme solicitude for the general security, leading to a minimum of regard for the individual accused and reliance upon summary, unhampered, arbitrary, administrative punitive justice, and at the other extreme excessive solicitude for the social interest in the individual life, leading to a minimum of regard for the general security and security of social institutions and reliance upon strictly regulated judicial punitive justice, hampered at all points by checks and balances and technical obstacles.¹¹¹

Pound is, again for merely contingent reasons, an exponent of the Crime Control Model, very similar to Learned Hand in his general outlook, and subject to the same criticisms.¹¹² We have, he argues, to

111. *Id.* at 576-77. In connection with this conception of a kind of pendulum within criminal procedure, compare Hall, *supra* note 81, at 729-30; *LIMITS* at 242.

112. There are many defects in the specifics of Pound's argument. He believes that "organized professional criminality on a large scale" rather than "the occasional criminal, the criminal of passion, and the mentally defective" of the past is the problem of the 20th century. POUND *supra* note 42, at 591-92. I do not believe this proposition is defensible—certainly not in the simple terms Pound employs. He also claims that the main American innovations over English criminal procedure "were in the direction of mitigation and afforded additional incidental opportunities for the guilty to escape." *Id.* at 597. This idea has been pretty thoroughly demolished by A. Goldstein. See Goldstein, *supra* note 47. Pound suggests that appellate review was needed to develop the substantive law in the 18th and early 19th centuries; but having accomplished that end appellate courts should now concern themselves more with guilt or innocence than with the technical details of the law. He seems to think this change would secure more

recognize that whereas the problem "a hundred years ago . . . seemed to be how to hold down the administration of punitive justice and protect the individual from oppression under the guise thereof," now it is "how to make criminal law an effective agency for securing social interests." We have to come to terms with the fact that "in holding down the potentially sinful administrative official we give the actually sinful professional criminal his opportunity . . ."¹¹³

Pound has what Packer would describe as the "administrative" conception of the criminal process characteristic of the Crime Control Model. Defense counsel is not mentioned among the required checks on the powers of prosecutors and judges which he envisions in a restructured criminal process; he believes that the development of a professional ethic among judges, enlightened scrutiny by an informed bar, and the keeping of careful public records would suffice.¹¹⁴ Through-

convictions, but he ignores the possibly innocent defendants who suffer now from appellate unconcern with the adequacy of proof and who would benefit from the change he suggests. My hunch is that the appellate tendency he deplores works to the *disadvantage* of more defendants than it helps.

Nevertheless, judging from Frankfurter's introduction to the *SURVEY*, *supra* note 42, which describes what seem to have been truly extraordinary conditions in Cleveland, Pound's claims may have had some unusual cogency. It is possible that within an over-all Battle Model conception of the process he may have been factually correct in claiming that the rules of the process unduly favored defendants (begging, of course, the question as to what is "undue" in these matters), and hence *pro tanto* justified in arguing for a criminal process more nearly of a Crime Control sort. Based on the *Survey's* findings, Pound gives a figure of 23% of all persons prosecuted pleading or being found guilty. Pound, *supra* note 42, at 633. This figure would be astonishing, except that in itself it is relatively meaningless since it is a percentage of initial felony arrests. In evaluating the "balance of advantage" in the system, we have to begin with a figure representing a considered charge. Cf. A. BLUMBERG, *CRIMINAL JUSTICE* 53 (1967) (charges at arrest tend to exaggerate seriousness of the offense). The *Survey's* figures show that roughly 50% of persons against whom felony prosecutions were initiated were likely to be convicted (on plea or verdict). *SURVEY*, *supra* note 42, at 241 (comparing line 5 with line 5(e)). This is extraordinarily low when contrasted with the comparable figure for today, which generally is nearer 90%. BLUMBERG, *supra*, at 28-29, 54-55. Of course police and prosecutorial inefficiency and corruption, which Pound scourges, could be as responsible as imbalanced procedural rules; offhand this seems a more likely explanation. If so, the fact of a low conviction rate in itself gives no support to a Crime Control Model conclusion. A similar *caveat* is applicable to most modern sophisticated Crime Control arguments: the relevant "interests" are "balanced," and the scales tip in favor of wiretapping, entrapment, and the like, on the ground that otherwise an insupportably low number of successful prosecutions (especially of "professional criminals") will be achieved. Virtually never do these apologists consider whether the same desideratum could not be more directly reached by the elimination of corruption and the intelligent use of resources in police departments and prosecutors' offices. If this is the case the purportedly "realistic" argument for the necessity of a move toward the Crime Control Model vanishes.

113. POUND, *supra* note 42, at 593.

114. *Id.* at 635. Pound is "skeptical" about a proposal in one of the *Survey's* reports to institute a public defender system, because it seems to him that adding such "another functionary" is just a response to "lack of modern organization in prosecution and in courts" and that if "bad organization of prosecution, bad conditions in the prosecutors' offices, and a tendency to perfunctory routine there and in the courts" were eliminated, "no further official need be provided." *Id.* at 634.

out his essay he harps on "those who habitually represent accused persons"¹¹⁵ and he frequently deplors the state of affairs in which instead of making proper provision for the control of official power "we in fact subject prosecution to the sagacious scrutiny of professional defenders of accused persons, who study the weak points in the system and learn how to take advantage of them."¹¹⁶ The "excess of mitigating agencies" which Pound wants pruned away,¹¹⁷ are those "weak spots" in the system which can be "worked" by the habitual defenders of accused persons.¹¹⁸ A better counterpoint within the Battle Model to the traditional Due Process theme in which defense counsel is "champion of the accused" could hardly be found: the whole affair is still a contest of irreconcilable parties, but defense counsel seems less like a "champion" and more like a "hired gun" to one who, as Pound, fears that in modern conditions society is losing the battle too often.

Pound's essay particularly bears discussion here because of the strong Family Model strains in his otherwise predominately Crime Control approach. He advocates the "rehabilitative ideal,"¹¹⁹ which he argues explicitly is inconsistent with Battle Model assumptions. He maintains that "individualization" of treatment¹²⁰—what he calls treating "the criminal" rather than "the crime, in his person"¹²¹—is an essential advance over 19th century Due Process ideology. That ideology sought "to reduce the whole administration of criminal justice to abstractly just, formal, rigid rules, mechanically administered."¹²² The new ideal of "concrete justice"¹²³ rests upon a respect for human dignity in the person of the actual individual offender, not in the Due Process Model's "feeling for abstract individual liberty" which demands formal procedural checks but permits "the old-time ignominious punishments

115. See, e.g., *id.* at 631.

116. *Id.* at 636. Perhaps the bias against defense counsel and his role which pervades the SURVEY, *supra* note 42, is due to the odd way in which its directors guaranteed the "truth" of the "facts" they relied upon: they checked them with "the officials administering the respective departments under investigation." It is hardly surprising that no "facts" favorable to defense lawyers were uncovered in this way—which, however, was thought to lead to "an authentic and agreed analysis of the *facts*" (*italics in original*), so that inferences and proposals would have "indisputable" bases in fact. See FRANK-FURTER, *Introduction*, SURVEY, *supra* note 42, at viii.

117. POUND, *supra* note 42, at 626. "Mitigating agencies" seems to be the Crime Control word for what the Due Process Model (in the person of A. Goldstein) calls "screens." See Goldstein, *supra* note 47, at 1150, 1163 *et seq.*

118. POUND, *supra* note 42, at 632.

119. Cf. ALLEN, *Legal Values and the Rehabilitative Ideal*, in ALLEN, *supra* note 70, at 25.

120. POUND, *supra* note 42, at 645-46.

121. *Id.* at 585.

122. *Id.*

123. *Id.*

that treated the human offender like a brute, that did not save his human dignity." Respect for the individual human personality permits us "to take account of the social interest in the individual human life and to weigh that interest against the social interest in the general security on which the last century insisted so exclusively."¹²⁴

Pound is plainly doing more than advancing a Crime Control "administrative" conception of the process,¹²⁵ with rules more favorable to the state, over a Due Process conception in which formal rules work to the advantage of defendants. He is advocating something radical: a change from a Battle Model (formal and punitive—whoever the rules happen to favor) to a Family Model (concrete and reconciliatory—with faith in public officials). His objection to the 19th century Due Process Model is *both* that it is inadequate to modern conditions of crime (here he follows Hand), *and* that it lacks solicitude for actual, particular defendants (especially if convicted).¹²⁶

III. The Effects of Constricted Vision

The prevailing Battle Model ideology accounts for the most basic and characteristic qualities of our criminal process. It also accounts for—consists of—assumptions and habitual categories of thought which limit our perception and understanding. Such constricted vision has

124. *Id.* at 587.

125. Pound's views on the problem of administrative discretion are complex and to some extent seem contradictory. His essay begins with a rather nice account of the relationship between good and bad men and good and bad institutions in the production of particular social results. *Id.* at 559-61. At another point he discusses the close relationship of the criminal law to politics, and in particular the danger of "oppression through the criminal law" and its use "to keep a people or a class in subjection." *Id.* at 578. Cf. the ominous phrase at 581—prosecution and punishment must ultimately involve someone's discretion, "with all which that may imply." And yet in his treatment of trials he seems to rely mainly on an informed bar, rather than on active defense counsel and strict formal rules, to ensure fairness to defendants; he rejects the 19th-century Due Process Model fear of bad officials on the Crime Control Model ground that now we must fear criminals more, *id.* at 593-95; and he argues for administrative discretion in a system of "individualized" justice, *id.* at 585-86. He never seeks to reconcile these ideas with either his general theory of the relationship between men and institutions, or the specific problem of the danger of oppression in the criminal law.

126. Pound does give one rather Crime Control-sounding reason for the desirability of individualization, "It cannot be said too emphatically that this is not a matter of sentimentality or of mushy humanitarianism. It is a practical matter of saving the expense involved in bungling efforts to deal with pathological cases by methods devised for the wilful wrongdoer and of insuring effective handling of criminals instead of futile attempts to deal with crime." *Id.* at 645-46. This could be Learned Hand speaking in favor of the rehabilitative ideal. If we respect the individual human personality, as Pound argues we must, why do we have to insist that our reason for doing so is to save money? One cannot, obviously, infer from mere attachment to the notion of individualized treatment that the Family Model has been adopted. Cf. Allen's discussion of Garofalo, *Garofalo's Criminology and Some Modern Problems*, in ALLEN, *supra* note 70, 63, at 84-85, 89-90.

two effects. One cannot see things which are beyond one's narrow perspective, and one does not see in their full complexity and context those things which are within one's perspective.¹²⁷ We cannot really understand or deal with the situation in which we find ourselves because we cannot even imagine the ways in which things might be fundamentally different from what they are or seem to be becoming. As the country wallows in a crisis of inability to deal with its "crime problem" we all share an awful sense of helplessness. The Crime control aspect of the Battle Model's essential ambivalence offers as "solutions" pre-trial detention, or wire-tapping, or stop-and-frisk, or restriction of the privilege against self-incrimination; but most of us realize that these are only nostrums. Nevertheless, many people who know better seem to feel driven to advocate (or at least to tolerate) such irrelevant and obnoxious tinkering because they cannot imagine any more appropriate and basic response.¹²⁸

A. *Guilty Pleas and Plea Bargaining*

From the point of view of the Battle Model, a criminal process without the institution of guilty pleas is apparently as impossible to conceive as warfare without the institution of surrender.¹²⁹ The Due Process and Crime Control Models both accept the institution of guilty pleas and plea bargaining.¹³⁰ The Crime Control Model does so enthusiastically and resists the imposition of safeguards while the Due Process Model does so reluctantly and only with strict safeguards. But both Models are darkened by the fear that, as Packer puts it, "any significant increase in the number of criminal prosecutions going to trial would result in the breakdown of the criminal justice sy-

127. Speculative limitations have practical effects. "[M]ost of all, the existing range of thought and evaluation . . . impose[s] rigorous limitations on actual deliberate change . . ." Hall, *supra* note 81, at 723.

128. District Judge Hart's recent change of views on pre-trial preventive detention is an instructive instance. In his testimony in *Hearings*, *supra* note 100, at 4, he argued with overwhelming cogency that detention is not a practical response to the pretrial crime problem. Yet since that time, discouraged by the prospects for sensible reform, he has himself come to advocate a measure the inappropriateness of which he had so thoroughly demonstrated. REPORT OF THE JUDICIAL COUNCIL COMMITTEE TO STUDY THE OPERATION OF THE BAIL REFORM ACT IN THE DISTRICT OF COLUMBIA, at 32-34 (May 1969).

129. The surrender institution of the criminal process is rather lopsided, compared with that of warfare, since the overt arrangement of concession of defeat is made use of almost exclusively by one side. But "prosecutorial discretion" is well known and must often function as a "low visibility" concession of defeat. J. Goldstein has shown how the State also frequently concedes even before the prosecutor is called upon to exercise his discretion. Goldstein, *supra* note 97.

130. LIMITS at 221-26. It is revealing that two leading casebooks, containing extensive materials on the plea of guilty and plea bargaining, hardly so much as hint at the possibility of a system of trials for every defendant. KADISH & PAULSEN, *supra* note 77, Ch. 13, § c; HALL, KAMISAR ET AL., *supra* note 77, Ch. 20.

stem."¹³¹ Neither can see any point in a typical defendant "going down fighting"¹³² if a successful plea bargain, or in hopeless cases a guilty plea, can settle the case without a formal joust. Both Models accept the proposition that "there is a distinct social advantage to terminating criminal proceedings without trial."¹³³

No serious attention has been given to the possibility that the whole institution of plea bargaining and guilty pleas might be eliminated.¹³⁴ What is so inconceivable about a process which includes a trial (perhaps a shorter and neater trial) for *every* defendant?¹³⁵ We can perhaps concede that the net total of "fairness" and accuracy could be greatly increased with such a process, even if such shorter trials were less "fair" and less accurate than the full-blown pitched battles which a very few defendants now receive. What is it about the Battle Model which seems to foreclose thought about such possibilities? On the one hand, the Due Process Model adherent is consumed with notions of "liberty" in the abstract (as Pound observed), not with the fates of actual individuals, and could not muster up the faith in public officials which a streamlined trial would require. On the other hand, the Crime Control Model adherent could not accept the "inefficiency" of so many proceedings and the affording of a true adversary process to every defendant (one might suppose that a trial for every defendant would result in some net increase in acquittals¹³⁶). The trial is, on either view, an evil to be avoided if possible.

131. *LIMITS* at 221.

132. *Id.* at 222.

133. *Id.* The Due Process Model recognizes that even with the strictest safeguards, "a high proportion of criminal defendants will choose to plead guilty," *id.* at 223, although it does insist that "a criminal trial should be viewed not as an undesirable burden but rather as the logical and proper culmination of the process," *id.* at 224.

The Due Process Model adherent's discomfort with guilty pleas derives from the fact that the criminal process before trial is generally asymmetric, and largely in the control of the prosecution. Hence his insistence on prophylactic and remedial measures against unfairness. *Id.* at 223-25. The Crime Control Model adherent naturally welcomes the pre-trial bias in the prosecution's favor.

134. See note 130 *supra*. The closest Packer comes, as to guilty pleas, is under the rubric of the Due Process Model: "There may indeed be a serious question whether they should be permitted at all . . ." *LIMITS* at 224. But Packer does not seem to take his "serious question" seriously; his comment apparently reflects only the Due Process Model adherent's insistence upon symmetry in the criminal process. See note 133 *supra*.

135. This is, in fact, the situation in a number of European criminal procedure systems. See, e.g., W. v. Strafvordering, Art. 341, § 4 (Netherlands). Mannheim suggests that the general Continental requirement of a trial in every case may be based upon distrust of the fairness of pretrial procedure. *Trial by Jury in Modern Continental Criminal Law*, 53 L.Q. REV. 388, 395 (1937).

136. Without making an elaborate investigation of the subject, I find it impossible to come even to a satisfying tentative judgment concerning the importance of acquittals in the American criminal justice system, as a measure of the system's precision in making factual determinations. What counts as an "acquittal" is never clear in the available statistics (e.g., how does a conviction for a lesser offense appear? how do fact reversals

Current discussions of guilty pleas and plea bargaining contain no consideration of the possibility that trials themselves might be good for defendants and for society.¹³⁷ The Crime Control and Due Process Models are concerned only with the relationship of trials and pleas to the end of the process—punishment of the guilty. But if a trial can be seen as a goal in itself—a lesson in legal procedure, dignity, fairness and justice, for the public and for the accused (whether he is convicted or acquitted)—we would not want to lose its potential for good by encouraging short-circuits. Because of the constraints imposed by our ideology about criminal procedure, speculation in this direction has been almost entirely neglected.

A process built upon Family Model assumptions and concerns, besides taking account of the value of trials in every case to ensure fairness to individual defendants and to secure the educative benefits of trials,¹³⁸ would also be concerned that there are social interests in criminal cases which cannot be left to the parties to submerged in pleas of guilty. The Family Model would make this possibility problematic because it does not interpret the process from the win-or-lose vantage point of a contestant. Consider, for example, the insanity defense. So long as the criminal process is a struggle between hostile forces, the insanity defense and the policies it represents will often be submerged in pleas of guilty. But it seems hardly conceivable that whatever is at stake in the insanity defense should be left to defendants and prosecutors to negotiate away—particularly, although not exclusively, because the defendants concerned can hardly be regarded as fully

on appeal appear?). More fundamental, the usefulness of such an index of precision depends upon an appropriate, well-defined basis for a "case entering the system"—if a system screens cases very carefully before permitting them to reach trial, it may be expected to produce a lower trial acquittal rate than a system with less fastidious pre-trial procedure even though its trials are actually more careful with respect to the facts. Put another way, what counts as the "trial" whose precision is being measured? How much pre-trial and post-conviction factual investigation should be included within the process whose precision is being measured?

It follows *a fortiori* from the imponderability of our own statistics for my purposes, that no comparative assessment seems feasible. All that I can say is that there is nothing in the statistics I have seen that is *inconsistent* with the hypothesis that a system without guilty pleas will have a higher rate of acquittal, other things being equal. Compare, e.g., ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 261 (1968), and A. BLUMBERG, CRIMINAL JUSTICE 29-31, 54 (1967), with CENTRAAL BUREAU VOOR STATISTIEK, JUSTITIELE STATISTIEK 24, 33 (1967) (Netherlands).

137. On a number of other procedural questions which Packer treats at some length, he also gives no consideration to whether one solution or another would be better for particular defendants. See, e.g., LIMITS at 228-33 (on the availability of appeals); at 233-36 (on the availability of habeas corpus); at 211-217 (on pre-trial bail).

138. Cf. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 7-8 (1966); Comment, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 YALE L.J. 483, 496 (1965).

competent to do so.¹³⁹ The Family Model ideology would require that if some persons are not to be regarded as responsible, but are to be treated (or left alone) upon another basis, we cannot ultimately regard it as desirable that they pull themselves up into functional responsibility by the bootstraps of a guilty plea.¹⁴⁰

B. *The Failure of the Juvenile Court Movement*

There is common agreement that the juvenile court movement—measured against its initial ideals and expectations—is more or less of a failure. This is not to say that everyone thinks it should be abolished—some of its severest critics still regard it as a lesser evil¹⁴¹—but that it is not even remotely what its founders set about to create. Yet no one has given a satisfactory account of the brief life cycle and discouraging failure of the movement.¹⁴² I do not propose to do that here. I want only to suggest the underlying explanatory theme upon which I think a successful account would have to build. I want to suggest that both the failure of the juvenile court movement, and the failure of its critics adequately to account for its failure, have a common explanation in the Battle Model and the constricted vision it imposes.

The inspiration of the juvenile court movement, beginning at about the turn of the century, was the closest thing to a Family Model idea that we have ever had in this country. Proceedings and dispositions in “delinquency” cases were to be in the “best interests of the child.”

139. Cf. *Pate v. Robinson*, 383 U.S. 375, 384 (1966).

140. An analogous and connected problem arose in *Lynch v. Oberholser*, 369 U.S. 705 (1962), which held that a defendant has a right not to have an insanity defense interposed over his objection. This case can only be comprehensible within the Battle Model ideology—in what other terms would delegation of the decision to punish or to treat (or ignore) be left to a defendant himself? The Battle Model tends to see the defense as a tactic by which an accused can remove himself from the criminal law battlefield, see note 73 *supra*, not as an occasion for a social judgment. Of course, it is a tactic often made unattractive to defendants because of automatic “civil” commitment if it succeeds. A recent case has indicated, however, that this sanction is of dubious constitutionality since it is thoroughly irrational. *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968) (per Bazelon, C.J.).

To the extent to which J. Goldstein and Katz, in *Abolish the “Insanity Defense”—Why Not?*, 72 YALE L.J. 853 (1963), can be taken to be suggesting that the insanity defense might be wholly subsumed into the *mens rea* defenses—with the implication that a defendant should thereby be able to preclude inquiry into his sanity by refusing to invoke the defense—I think their argument also rests upon the Battle Model ideology.

141. See, e.g., ALLEN *The Juvenile Court and the Limits of Juvenile Justice*, in ALLEN, *supra* note 70, at 43 [this essay will be hereinafter cited as ALLEN, *Juvenile Court*]; REPORT OF THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 78 (1967).

142. The reader who is unfamiliar with the literature on the juvenile court will find most of it cited, in connection with a full-blown version of the standard Due Process Model view of the institution, in *In re Gault*, 387 U.S. 1 (1967). Probably the best single critical essay is Allen’s, *supra* note 141.

The juvenile court was to deal with the needs of the particular child before it, and the child therefore was to be treated as an individual (in Pound's sense), not as "the defendant." In such a proceeding, it seemed, the procedural rules designed only to equalize the balance between the state and the accused in a criminal trial would have no place, because the state would have no interest adverse to that of the child; they would be replaced with procedures which would not traumatize the child, and which (were he found in need of care) would initiate the process of his "redemption."

Such was the new idea of the juvenile court movement. But it was an idea imposed artificially upon an unchanged Battle Model substratum. Very little effort was ever made, by the society as a whole, to implement it. Facilities, staffs, funds, and the like have never been nearly adequate to the needs of children. The "process" has been one of rush, routine, crowding, arbitrariness and often squalor and even brutality. There has never been any real commitment to a non-hostile attitude. Children have been shuffled off into dreary institutions where they can be exiled and forgotten—just like criminals—and the label "delinquent" and all of its euphemistic alternatives have persisted in memories, police and court records, and so forth, as permanent badges of obloquy. Most critically of all, the idea of the juvenile court demanded a Family Model spirit¹⁴³ of genuine love and continuity of concern among officials and the general public. That spirit never came. "Eradication of delinquency"¹⁴⁴ remained the only essential goal. A rhetorical abstraction of love was superimposed upon a reality of indifference, hostility, and ostracism.

The process was to be designed to "help" children, but the main form this helping took was to deprive them of the substance and atmosphere of dignity and fairness that Due Process rules afford, if they do nothing else. The result was that in a Battle Model process whose rules had been a compromise between Due Process and Crime Control

143. "[R]ules and institutions are of far less importance than the mode and spirit in which they are administered." G. WILLIAMS, *supra* note 12, at 3. Cf. DEVLIN, *supra* note 37, *passim*. But because of our normal Battle Model assumptions (which assume hostility and therefore do not make the question of spirit problematic), its importance is usually overlooked in American thinking on criminal procedure.

A good example of an academic lawyer's blindness to this crucial consideration—a blindness parallel to that of the founders of the juvenile court movement—occurs in Kadish, *supra* note 56, at 354-57. Kadish proposes the use of comparative law information from countries with atmospheres in their criminal procedure quite different from ours to help resolve difficult due process (fairness) issues in this country. Cf. note 83 *supra* on the critical importance of ideological self-consciousness in comparative criminal law scholarship.

144. ALLEN, *Juvenile Court*, *supra* note 141, at 59.

strains, the idea of the juvenile court movement served only to justify the elimination of the Due Process half of the balance.

The next stage in the life cycle of the movement was inevitable. Within a Battle Model process, an extraneous notion with no firm roots in the prevailing ideology or in reality caused a dramatic shift towards a Crime Control process; obviously, given the tension inherent in the Battle Model, we would expect that those for whom Due Process considerations are most important would soon see what had actually taken place and would demand the reintroduction of procedural protections. That is exactly what happened.¹⁴⁵ As soon as it became apparent that the juvenile court process was, in reality, little more than the ordinary criminal process minus most protections for the accused, there was a terrific clamor to reintroduce those procedural protections whose initial abolition was practically the only concrete achievement of the juvenile court movement.

Thus the Battle Model ideology's unchanged domination of American thought prevented the initial creation of a juvenile court of the sort which was envisioned. When the reaction came, it too was confined by the Battle Model. Modern revisionists, on the whole have not agitated to make the original Family Model ideal of the juvenile court a reality, but only for a return to a fairer "balance of advantage" within the Battle Model. Their standard argument has not advanced beyond the niggardly proposition that the juvenile court idea involved a *quid pro quo*—the child gives up his procedural rights, getting in return a variety of special and favorable treatment; and since the child's *quo* has never materialized, it is unfair to deprive him of his *quid*.¹⁴⁶ Very few have seen the issue in its original terms, outside the ideological limits of the Battle Model, and wondered why we should accept this peculiar idea that shoddy procedure is acceptable so long as it is followed by good treatment, or that exile into an institution is tolerable so long as it has been preceded by an elaborate formal battle. The ideas that fair and dignified procedure is a substantive good in itself,¹⁴⁷

145. The reaction crystallized in *Kent v. United States*, 383 U.S. 541 (1966), and *In re Gault*, 387 U.S. 1 (1967).

146. See *In re Gault*, 387 U.S. 1, 22-23 n.30 (1967). ALLEN, *Juvenile Court*, *supra* note 141, at 54-56, seems to adopt, at least partially, the *quid pro quo* analysis.

147. The juvenile court is the classic case of Battle Model inattention to the substantive effects of procedure. We are only just beginning to realize that apparent fairness in process may be necessary for effective treatment thereafter. Cf. *In re Gault*, 387 U.S. 1, 26 n.37 (1967). So far we have not gone further than this to inquire whether the observance of many traditional due process rules may not be good for defendants in other ways and, even more importantly, whether it may not be good for the society as a whole. I am indebted to J. Weiss, *The Poor Kid*, 1967 (unpublished paper), for first

and that *both* what comes after adjudication *and* what precedes it demand continuing concern for the individual's well-being, belong distinctively to the Family Model and have played disappointingly little role in the intellectual or social history of the juvenile court.

The question remains why there has been no successful attempt to explain the way in which things went wrong. Dean Francis Allen made a rare attempt. Its inadequacy illustrates the limitations of the Battle Model ideology. Allen's argument is that the harmony of interest between the state and the child on which the juvenile court ideal rests is a fiction, and the failure of the movement was the simple and almost logically required consequence of the conflict between this fiction and the facts. The "best interest of the child" must sometimes be subordinated to the real and unavoidable demands of society, and any attempt to design a process which rests on a denial of this basic fact is doomed to failure.¹⁴⁸ Allen's account of the history of the juvenile court movement seems to involve two complementary propositions: first, real, substantive conflicts of interest necessarily demand a process in which hostile parties do formal battle with rough equality under the rules, or intolerable abuses of power will occur; and second, if abuses of power and irreducible conflicts of interest co-exist, the inescapable prescription is a readjustment of the rules.¹⁴⁹

Now these assumptions simply cannot be true; if they were, the family itself with its real and inescapable conflicts of interest could not have proved a viable institution. Even when behavior is intolerable, the agencies whose task it is to prevent it need not *a priori* assume a hostile character toward those who transgress. On Allen's view, our prescription for abuse of parental disciplinary rights would have to be a judicialization of the family. The ideology of family life leads us to assume that such abuse is a discreet problem manifesting a special pathology of particular families, not an analytically necessary consequence of the unavoidable conflicts between the interests of parents and of children which requires a general restructuring of family life. We thus believe, for one context at least, that an adjudicative process built upon love and continuing concern can coexist with conflicts of substantive interest.

suggesting this unorthodox way of looking at due process guarantees. Cf. also *The Borderland of the Criminal Law: Problems of "Socializing" Criminal Justice*, in ALLEN, *supra* note 70, at 1, 19-20.

148. ALLEN, *Juvenile Court*, *supra* note 141, at 48-61.

149. These seem to me the clear implications of Allen's discussion of the court. *Id.* at 54-56.

Perhaps Allen is right that a myth of perfect harmony of interest accounts for the failure of the juvenile court—but only if it can be shown why that myth precluded attention to the Family Model alternative: a process built not on the idea of harmony but on that of reconcilability.¹⁵⁰ It seems, however, that he lumps the two together as *a priori* impossible. It is the latter assumption that I deny. It seems to me that if Allen is to give us an adequate account of the failure of the juvenile court, it will have to be a contingent, not an analytic one.¹⁵¹ He will have to show the critical respects in which society as a whole is different from the family, and why reconcilability can co-exist with lack of perfect harmony in the latter but not in the former. For myself, I believe that much of the apparent difference lies in the ideology of the Battle Model, which dominates our social thought, but which seems altogether out of place in thinking about problems of discipline within a family. Unlike Pound, I am not certain that a Battle Model ideology is an *inevitable* concomitant of a large society. Therefore I believe the explanation for the juvenile court's depressing history must be sought in the *fact* of the inconsistency between the working beliefs of American society and the superimposed idea of reconcilability of interest, not in any supposed analytic necessity for such inconsistency. But one cannot undertake such an historical inquiry into the relationship between ideology and social reform so long as one is not self-conscious concerning the ideological element in one's own thinking. It is here, I think, that Allen largely fails us.

The self-fulfilling character of ideology is very clear in this depressing history: first, the unchanged assumption of hostility (and all its corollaries—*e.g.* with respect to the behavior of public officials) precluded the achievement of a genuinely Family Model process; second, the apparent failure of the movement served to confirm Battle Model assumptions; third, the rejection of the procedural innovations of the juvenile court (*e.g.* in the *Gault* case) was taken as a rejection of the central idea of the whole movement—although, looked at from the ideological standpoint of the Family Model, those procedural consequences were merely contingent derivations from a central idea which was never implemented at all.¹⁵²

150. Cf. Allen's hints in that direction, notes 152 and 187 *infra*.

151. Allen does suggest at several places, *e.g.*, *id.* at 53, that the Battle Model essence of the court is only unavoidable now and for "an extended period in the future," and that it rests on the court's incapacity to deal with the social causes of crime. But the nature of his argument seems to leave no real room for a process built on any hypothesis other than irreconcilability of interest.

152. Probably, from a Family Model point of view, the procedural innovations of

Troubled by the difficulties and implications of what I have been saying, some readers may be asking themselves at this point whether all of this would not have looked entirely different if only some better buildings had been built, more and better judges and social workers and psychiatrists hired, and a bit more sophisticated approach taken to the problem of the design of the process for maximum substantive benefit. Is it really necessary to get into all the imponderabilities of ideology in order to account for inadequate budgeting? This question misses the joint in two ways. On the simplest level, it is love and concern, not cubic-meters-of-institutional-space or social-workers-with-Ph.D.'s-per-child which count. More significantly, if the question is given a more generous reading—so that the facilities taken to exist would include the components of the required spirit in addition to the tangible evidence of concern—it still misses the point. If this had ever been true of the juvenile court movement it would have *constituted* a change in ideology. To manifest an ideology is to hold it, and to hold an ideology is to manifest it.

One can go further. Facilities, after all, would not have been a great *economic* burden for the society, so the reason for their coming or not coming into being must be sought elsewhere. Thus the failure of the juvenile court movement to secure even the material manifestations it called for is the best evidence that ideological change never descended to a level more profound than rhetoric.¹⁵³ The ideological problem cannot be avoided because ideology is inseparable from social fact, and each of the two constitutes a part of the explanation of the other.

C. *Ethics Dilemmas in the "Adversary" Process*

Monroe Freedman recently gave cogent and principled arguments for some common practices of defense counsel which are usually thought of as unethical.¹⁵⁴ Freedman raised, and answered affirmatively, three

the juvenile court movement were in fact largely inconsistent with the central idea of the movement, since the substantive effects of scrupulous procedure had never been taken into account with any sophistication. Cf. Weiss, *supra* note 147. And as Allen observes, the "larger ambitions" of the juvenile court movement probably also account for the fact that so little progress has been made toward "achieving the more modest goals" of "decency and humanity in dealing with the misbehaving child." ALLEN, *Juvenile Court*, *supra* note 141, at 57.

153. Cf. SYKES, *supra* note 76 (Ch. II particularly). Mead would perhaps not have been so uncritically confident that the juvenile court represented a genuine ideological shift away from "the psychology of punitive justice" if he had looked, for ideological evidence, to the facts of everyday performance rather than to the fantasies of juvenile court rhetoric. Mead, *supra* note 36, at 594-96.

154. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

questions concerning the ethics of defense counsel: May he properly (1) cross-examine for the purpose of discrediting an adverse witness whom he knows to be telling the truth? (2) put the defendant on the stand if he knows he will perjure himself?¹⁵⁵ (3) give the defendant legal advice which he knows will tempt him to commit perjury? Freedman's justification for each of the practices is that, while it seems to involve some condonation of dishonesty, its propriety is a necessary corollary of a more basic ethical consideration: the confidentiality of the lawyer-client relationship. He argues that the proper representation of a defendant, in the procedural system we have, requires that a client have complete confidence in his counsel and be willing to reveal all he knows without fear that to do so will redound to his "disadvantage."

Freedman does not consider the underlying question of what sort of process we might want. He takes the process as it is, as a "struggle from start to finish" between irreconcilably hostile parties. Within it he sees defense counsel as the champion who rights, to some extent, the imbalance of advantage between the defendant and the state. Defense counsel is to do for the defendant what he could do for himself, if he had legal training. It is from this conception that the basic norm of absolute confidentiality follows, and it is that, in turn, which justifies the three questionable practices.¹⁵⁶

Freedman elicited a response of pious hypocrisy so intense as to give one confidence that unquestioning homage to the ethical dogmas he questioned was serving as a defense against the conscious confrontation of some very troublesome underlying conflicts—conflicts, on the one hand, between the ethical dogmas and the obvious realities of criminal trials, and on the other hand between those dogmas and other values in the criminal process. Among other things, it was seriously suggested that he be disbarred for having brought the subject into the open.¹⁵⁷

A somewhat more temperate response to Freedman's article came from David Bress, United States Attorney for the District of Columbia.¹⁵⁸ Bress leaves no doubt but that he agrees with Freedman's basic conception of the process as a struggle between the state and the ac-

155. Freedman posed this problem in broader terms, encompassing any witness for the defense, but actually discussed only the defendant himself as a witness.

156. Freedman shows that the Canons are useless as ethical guides on the questions he is concerned with because they are internally inconsistent in their prescriptions.

157. Freedman, *supra* note 154, at 1469 n.1.

158. Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493 (1966).

cused, carried on according to formal rules.¹⁵⁹ His only objection to Freedman's article is that he disagrees about what the rules of war should be. Why?—because it is “axiomatic that justice must be achieved for society as well as for defendants,” and “the fair determination of an individual's guilt and the protection of society are both important objectives”¹⁶⁰ Put more bluntly, Bress thinks the tactics which Freedman's argument justifies are too beneficial to defendants.¹⁶¹

Bress and Freedman do not go outside the Battle Model. However, there was a third contribution to the debate. Professor John Noonan argues from a dimly realized and quite different conception of the

159. See, e.g., *id.* at 1496-97, where Bress indicates that a major basis for his views is a desire to protect the honor of defense counsel from any association with impropriety (by forcing defendants to keep their perjuriousness to themselves). Since no truth-finding function of the process is served by such a notion (but cf. note 161 *infra*), it seems to derive only from a kind of chivalric code applicable to the contestants in a peculiar sort of battle. Bress does observe that “a criminal trial is not a sporting contest,” Bress, *supra* note 158, at 1498, but this seems to be nothing more than a Battle Model objection to anything smacking of an equal balance in the rules.

160. Bress, *supra* note 158, at 1498.

161. Bress tends to cloud this simple, direct confrontation with Freedman by consistent reliance on a transparent *petitio principii*. He says “Counsel for the defense must certainly fight vigorously, but he must do so within the framework of the prescribed rules.” *Id.* at 1497. He seems to think that Canon 5's limitation of advocacy to “fair and honorable means” is inconsistent with Freedman's position. *Id.* at 1494. Throughout his brief article, he seems to take it for granted that what Freedman argued for is “unethical,” and he tends to conclude rather easily from this that it ought not to be done. All of this is quite beside the point, since the question Freedman put was whether certain practices were fair, honorable, within the rules, and hence ethical.

The only reason Bress seems to have in support of his implicit assumption that Freedman's rules would put the process out of proper balance, is a notion of symmetry: things the prosecution cannot do, the defense should also not be allowed to do. *Id.* at 1493, 1495, 1498. The Due Process Model surely comes off better on this issue, because the Crime Control Model's argument from symmetry is unresponsive to the question posed. There is no confidentiality problem to speak of on the government's side, since the government (in the shape of a prosecuting attorney) is its own champion. The whole point of defense counsel—and the need for full disclosure and confidentiality—is to create a balance between the state and the accused, and it is hardly persuasive to complain on symmetry grounds against an institution introduced on one side precisely in order to establish some symmetry.

Bress does make one moderately effective point. If, as Freedman argues, defense counsel needs to know the full facts about a defendant in order effectively to represent him, he should not give legal advice which may induce his client to commence perjury before he has got the best possible factual account from the client, since early advice—e.g., that a blind rage is the only apparent defense—may encourage the client to “remember” such a rage, thus depriving defense counsel of pre-trial access to the facts which may confront him at trial. *Id.* at 1497. This practical difficulty with Freedman's view can be obviated if defense counsel gives such legal advice only after he has heard an initial account of the relevant events.

Bress also gives one argument which goes beyond the Battle Model: that an accused who sees his lawyer “employ unethical tactics” will emerge from the process contemptuous of the law, of legal proceedings, and of lawyers. *Id.* at 1497. To some extent, this exhibits Bress' tendency to beg the question as to what is ethical. Furthermore, it is perhaps doubtful that a defendant would regard his counsel as having “condoned” perjury if, after having tried to dissuade his client from that course, he reluctantly allows him to take the stand.

process.¹⁶² He begins by conceding that Freedman's position represents the "working principles of many lawyers."¹⁶³ He seems also to concede that if the trial were properly seen as "an irrational process—a substitute for trial by battle,"¹⁶⁴ he himself would have to accept Freedman's conclusions. Preferring, however, the "modern view . . . [which] looks less at the way in which trials have been conducted in the past than at the way in which they may be conducted in the future,"¹⁶⁵ he thinks that the professional responsibility of a lawyer should be measured against an ultimate duty to promote "a wise and informed decision of the case" in a trial designed as the "social framework in which man's capacity for impartial judgment can attain its fullest realization."¹⁶⁶ From this conception he derives his conclusions that impeaching a known truthful witness and permitting a perjurious defendant to take the stand are improper because they frustrate rather than promote a "wise and informed decision." But he agrees with Freedman that giving a client advice which may induce him to perjure himself is not improper because "A lawyer should not be paternalistic toward his client, and cannot assume that his client will perjure himself."¹⁶⁷ To Freedman's argument that the ethical rules he advocates will interfere with full communication from client to lawyer, Noonan's reply is that confidentiality is only an absolute given the conception of an irrational struggle from which Freedman begins.

The patent irrelevance of Noonan's response to the problems which Freedman had raised derives from the two respects in which it is unconnected with reality. On the first and simplest level—the level on which Freedman takes him to task in a Postscript—Noonan's argument "does not face up to the lawyer's practical problems in attempting to act ethically."¹⁶⁸ His ethical prescriptions assume a process which does not in fact exist. The only way he suggests that we might get to such a process is by a kind of ethical bootstrapping, in which individual clients are sacrificed in the interest of "the way in which

162. Noonan, *The Purpose of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966).

163. *Id.* at 1486.

164. *Id.*

165. *Id.* at 1487.

166. *Id.*, quoting from *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1161. (1958). Although Noonan does not note the point, *Professional Responsibility* is a document designed to justify the adversary system in general, and gives no special attention to the problems of professional ethics in criminal cases.

167. Noonan, *supra* note 162, at 1488. But Noonan does think that there comes a point at which the known facts are so "completely contrary to the defense he outlines to his client" that the argument against paternalism becomes "brute rationalization." *Id.*

168. Freedman, *supra* note 154, at 1484.

[trials] . . . may be conducted in the future": "Repeated acts of confidence in the rationality of the trial system are necessary if the decision-making process is to approach rationality."¹⁶⁹ Noonan may be right that such a reverse vicious-circle is one way to achieve basic ideological change; but given the present ideology, a defense lawyer's loyalty is necessarily owed primarily to his client, not to the faint hope of the trial of the future.

Noonan's argument is out of touch with reality on a still more important level. He has a vaguely attractive idea of a rational trial process, in which litigants do not need to be armed to the teeth with unpleasant weapons because they can have a justifiable confidence that out of a gently adversary proceeding will come a "wise and informed decision." But he shares the blindness of the founders of the juvenile court movement. He thinks it is possible to superimpose that kind of trial on an unchanged Battle Model substratum, and to manipulate the "rationality" of trials without regard to the things which trials accomplish. If trials were made as "rational" as Noonan wishes, the net effect of his proposals would only be to shift the balance of advantage in the total criminal process toward the state. The ultimate object and consequences of a trial would remain unchanged, but more defendants would lose and be convicted, because their champions at trial, already unequal to the opposition, would fight by more Queensberryish rules. As was the case with the juvenile court, any move toward a Family Model which takes none of the basic assumptions and context of the administration of criminal justice into account necessarily produces only a camouflaged change in the balance between the Due Process and Crime Control aspects of the Battle Model.

Noonan's article illustrates a general problem concerning the role and responsibility of defense counsel. The process as it is, and particularly in its relation to our penal system, forces the conscientious defense lawyer to represent his client in a way which is neither in the long-term interest of the client himself nor in the interest of society. Of course an innocent client adds a special poignancy to a case, but the real justification for winning an acquittal is that the consequences of a conviction are so pointless, so calculated to do nothing but harm to the convicted man¹⁷⁰ and so little apparent good for anyone else, that

169. Noonan, *supra* note 162, at 1487-88. Compare FRANK & FRANK, *supra* note 40, at 225-42, arguing that significant changes in trial tactics depend upon a fundamental change in the conception of a trial—although they, like Noonan, fail to relate such ideological change to changes in the social reality which fixes the context a trial takes place in.

170. Of course, there are rare exceptions. Malcolm X, Eldridge Cleaver, and "Zeno"

the most socially-conscious and ethical lawyer can wholeheartedly believe it his duty to secure an acquittal in any permissible way.¹⁷¹ So long as defendants and their lawyers can see no indication that any affirmative interest or need of a defendant has a place in the process, so long as the outcome of the process is seen to hold no possibility of doing good for defendants, I cannot believe any significant change in the basic attitude of the defense will take place. The defense will resist with whatever it can, and to the limits of its power, and such resistance will be all that the task of a defense lawyer consists of.

Process cannot be separated from its actual, practical, concrete substantive effects. That is a truth not represented in Packer's article or in the kind of thinking he exemplifies. It is a truth which escapes Noonan, when he argues as if we can have a "rational" and non-hostile process when one of the possible outcomes is wholly antagonistic to the most important interests of the defendant. It is a truth which similarly vitiates Jerome Hall's well-known article on the objectives of revision in federal criminal procedure, which begins with the premise that good "criminal procedure is . . . a sort of public utility which at least purports to provide better service in proportion to its rationality . . . [it] can be logical even though the substantive law is unjust or irrational . . . [it] discharges certain logical functions, the results of which are not necessarily desirable."¹⁷² By keeping process and substance rigidly compartmentalized, these writers fail to come to terms with what I believe is an inevitable fact: that process is affected by the whole of the substance which it is seen to implement.¹⁷³

In sum, I do not see how we can really understand what is at stake in the kind of ethical dilemmas which arise in criminal procedure so long as we remain confined by the ideology of Packer's Two Models. The Freedman imbroglio requires a more complicated analysis than

seem to have been instances. See *THE AUTOBIOGRAPHY OF MALCOLM X* (1965); *E. CLEAVER, SOUL ON ICE* (1968); *ZENO, LIFE* (1968).

171. There are, of course, cases where a defendant is patently too dangerous to be allowed on the street—that is, apart from his crime he exhibits the sort of "dangerousness" that by itself justifies detention. A defense lawyer is surely justified in believing that preventive detention decisions ought to be made separately from the Battle Model criminal process, and therefore in putting "dangerousness" aside as a consideration in defending an accused person.

172. Hall, *supra* note 81, at 725. If all Hall is saying is that it is best to have good procedure even if the particular contours of an offense category or two are undesirable, he is trivially right. But it appears that he is suggesting that "rational" procedure is desirable even though the substantive law is generally bad—either in that the General Part is "unjust or irrational" or in that the Special Part is consistently so. See notes 173 and 180 *infra*, for further discussion of Hall's views.

173. Hall admits as much, in adverting to the historical fact that harsh and hostile substantive law has led to procedural vehicles for acquittal that would in other circumstances seem wholly irrational. Hall, *supra* note 81, at 724.

the Battle Model's simple tension between Due Process and Crime Control considerations will permit. I do not claim to have disposed of the subject, but only to have suggested the direction in which I believe progress in understanding will have to be made.

IV. Conclusions

The intellectual apparatus Packer presented with such revealingly extravagant claims is in fact a clear, if unself-conscious, articulation of the ideology which is responsible for the characteristic limitations of most contemporary thinking about the criminal process. What Packer does is to make distinct the competing directions in which that ideology leads, and the resulting strains and compromises in our criminal process. But his Two Models will not help us come to real terms with the basic problems of the process; they will not permit a real understanding of guilty pleas and plea bargaining, of the juvenile court, of legal ethics, or of any of the other topics that could equally well have been chosen. Confined by the assumptions which unite his Models, we can imagine no significantly different ways of doing and understanding things from those we already know.

All of us who have had our formative experiences in an atmosphere so dominated by the Battle Model that it has seemed to exhaust the universe of possibility find it difficult to suspend disbelief in favor of a radically competing ideology, even if only temporarily and for speculative purposes. The initial and seemingly insuperable obstacle in approaching the Family Model is its basic premise of reconcilability of interest. One's instinct is to put the issue bluntly: Isn't this notion completely phony? Won't it necessarily be hypocritical, or question-begging, or brute rationalization, whenever invoked in a concrete case? We ought to beware of such reactions, not because they may not be true, but because they are so easy. They are exactly the reactions that the ideology of the Battle Model demands. We should try not to mistake our ideological limitations for necessary truths.

Reconcilability plainly cannot mean *harmony* of interest; except in a completely mystical and analytically useless sense complete harmony can never exist in a punishment situation. Reconcilability, if it exists at all, must be consistent with some conflict, or at least difference, of interest. As Allen has shown, Judge Waite's famous observation that unlike an ordinary court, which would "do something *to* a child because of what he *has done*," a juvenile court is concerned only with

"doing something for a child because of what he *is* and *needs*,"¹⁷⁴ is not and cannot be true. The inescapable fact is that the juvenile court often has "purposes to serve that involve more than the interests and welfare of the particular children coming before it."¹⁷⁵ Nor would Waite's notion be true in a family. My child is punished for what he *has done*—torn my books—and so long as punishing is what I am doing, past misconduct is a definitional and ethical prerequisite.¹⁷⁶

The problem of the plausibility of the Family Model cannot be solved by Waite's attempt to obliterate the essential and unavoidable distinction between a punitive and a best-interests proceeding. We have to discover, before deciding what sense can be made of the Family Model, whether reconcilability of interest can exist in a punitive proceeding. Allen is right that conflict is inevitable in punitive proceedings, but the question is whether we can come to terms with this conflict within an overall relationship which is not based upon hostility. It seems to me that we can, and that a sense can be given to the idea of reconcilability of interest which does not depend upon the fiction of harmony or identity of interest. Even when we are concerned with doing something *to* a person for some end other than to benefit him, we can nevertheless sensibly describe some kinds of systems—to be distinguished from others—as resting upon a fundamental assumption of reconcilability.¹⁷⁷

Reconciliation takes place in the Family Model particularly in the energetic pursuit by society of the convict's interest in every way consistent with the social need that he be punished. His sacrifice for the general good is kept to a minimum.¹⁷⁸ The experience is made as pain-

174. Waite, *How Far Can Court Procedure Be Socialized Without Impairing Individual Rights?*, 12 J. CRIM. L., C. & P. S. 340 (1921).

175. ALLEN, *Juvenile Court*, *supra* note 141, at 51.

176. Cf. *id.* at 55, where Allen argues that it follows that past misconduct is "jurisdictional" and therefore must be meticulously established.

177. But see 1 STEPHEN *supra* note 40, at 432. Stephen argues forcefully that in considering criminal procedure, people are prone to forget the essential character of trials, and that the inescapable truth is that, far from being transformable into "a scientific inquiry . . . litigation which assumes the form of a substitute for private war, and is, and must be, conducted in a spirit of hostility which is often fervent and even passionate."

178. Stephen cites a Frenchman's observation that the English at the beginning of the 19th century considered their process adequate so long as a few guilty people were convicted and punished, because that was enough for deterrence. To have had a more efficient process would actually have been bad, because it would have inflicted suffering on an unnecessarily large number of people. "It was natural that a convicted prisoner should be looked upon as a victim, chosen more or less by chance, when the whole law was in such a state that public sentiment would not permit of its being carried even proximately into effect." *Id.* at 439.

One may agree with Holmes that the essence of the criminal law is the use of the

less and as beneficial for him as possible. In concrete ways we can make plain that while he has transgressed, we do not therefore cut him off from us; our concern and dedication to his well-being continue. We have punished him and drawn him back in among us; we have not cast him out to fend for himself against our systematic enmity.¹⁷⁹

I do not think that this sort of fundamental approach is *a priori* impossible, although I certainly do not want to be taken as arguing that we can await its timely appearance. I am by no means sure that it is consistent with mass social life, although (unlike Pound) I am also not sure that it is inconsistent. In applying such an ideological metaphor to the real world, it is, of course, foolish to imagine that a Family Model in a "pure" form would be a conceivable state of human affairs—but surely we can place plausible criminal law systems on some kind of spectrum leading in that direction. In any case, what is perfectly clear is that any significant movement toward the assumptions of the Family Model would inevitably produce a criminal process which would be altogether different in the most fundamental ways.

Basic procedural questions can never be significantly understood without attention to their implications for and relation to issues of political philosophy. The difference between the Family Model and the Battle Model lies precisely in their opposed approaches to the central problem of political speculation: the possible and proper relationship of individual man to the state. This is an obvious point, and yet it is usually ignored by those who treat criminal procedure on a theoretical level as if it raised nothing but the technical problems of efficiency and accuracy.¹⁸⁰ Even those who do recognize the relation-

individual as a means to a social end—"a tool to increase the general welfare at his own expense," O. W. HOLMES, *THE COMMON LAW* 47 (1881); see generally *id.* at 42-49—and still regard the inequality of sacrifice implicit in a system such as Stephen describes as intolerable. That sort of situation is, however, characteristic of our criminal law; and the callousness with regard to the sacrifices exacted from individuals which it reflects strongly affects, I suggest, the sort of process we have. Consider *Commonwealth v. Welansky*, 316 Mass. 383, 55 N.E.2d 902 (1944), for example. A fifteen-year manslaughter sentence was imposed on a nightclub owner whose failure to abide by safety regulations happened to lead to a once-in-a-generation catastrophe. It may be that this sort of penalty is as effective, in a narrow sense, as frequent two-month sentences on all delinquent nightclub owners for an offense of "endangering human life" would be. Perhaps the total man-days of confinement—perhaps even units of human suffering—are less per unit of deterrent efficacy. But fifteen years is the destruction of a man's life. If we use people for the general social good—as deterrent examples—we ought at least to do so in a way less dependent on fortuity, and more consistent with the object lesson's entitlement to some human consideration. That, I think, would be the Family Model notion. Compare Rawls, *Justice as Fairness*, in *JUSTICE AND SOCIAL POLICY* (F. Olafson ed. 1961).

179. Cf. STEPHEN, quoted in note 75 *supra*, for the Battle Model's justification of such enmity.

180. Hall, for example, argues as we have seen that procedure is a mere rational instrument, with virtues or defects as such, and no necessary dependence upon the sub-

ship of political philosophy to criminal procedure have generally begged the essential question by assuming the inevitability of a state of irreconcilable hostility between the individual and the state. Packer, for example, begins his book with the observation that criminal law presents the problem of the use of and limitations upon state power, but he does not develop the procedural implications of this idea beyond the confines of his Two Models because he takes fundamental hostility for granted.¹⁸¹ The Battle Model ideology has foreclosed interesting speculation about the relationship between political philosophy and criminal procedure because it has brought with it an incapacity to think about the sort of genuinely radical political changes which would have fundamental procedural consequences.¹⁸² That is to say, the Battle Model is a part of a consistent political philosophy, and so long as it dominates the mind as an unself-conscious ideology no contrary speculation is possible.

If there is a direct relationship between political philosophy and ideology, and criminal procedure, there is also a complicated relationship between social fact and ideology. No one whose humanity is intact and vulnerable can have failed to recoil from exposure to the way in

stantive ends for which it is used or the relationship of State and individual which prevails in the political system that employs it. Hall, *supra* note 81, at 725. He asserts that no standard of criticism "has any relevance or utility apart from the ultimate ends of criminal procedure—to convict the guilty and acquit the innocent." *Id.* at 728. On the other hand, he is not altogether consistent in this. He acknowledges, for example, that procedure differs from ordinary logical argument in "the potentiality of practical effects." *Id.* at 725. And he observes, "What needs to be stressed is the mutual dependence of one upon the other, and the inevitable adaptation of each of the above three divisions of criminal justice [substance, procedure, and practice/discretion] to the conditions and changes in the other." *Id.* at 724. Cf. also note 173 *supra*. In J. HALL, *THEFT, LAW AND SOCIETY* 173-74 (2d ed. 1952), he observes that although "typical analysis implies" that procedure can be a merely logical instrument, this is not true. But the implications of these tangential insights into the non-separability of substance and procedure are not reflected in Hall's analysis of the objectives of procedural revision. Contrast Stephen's views, note 177 *supra*, and the issue over where the "balance of advantage" ought to lie, discussed in note 56 *supra*.

181. LIMITS at 5 (Part I of the book). See note 81 *supra*. See also Ploscowe, *The Development of Present-Day Criminal Procedure in Europe & America*, 48 HARV. L. REV. 433 (1935), which discusses the relationship of political philosophy to procedure, but only within a Battle Model context (i.e. the effect of political philosophy on the choice between Due Process and Crime Control processes). Pound, as we have seen, is an exception, but he relegates ideological alternatives to Eighteenth century colonial life. Pound, *supra* note 42, at 560-61. Cf. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U.L. REV. 450 (1967).

Political theory is naturally affected by the objective circumstances in which states and individuals find themselves, and this is reflected in criminal procedure, as a number of writers have observed. See DEVLIN, *supra* note 37, at 134-36; RADZINOWICZ, *supra* note 1, at ch. 1 & 2, and at 123 (1966); 1 STEPHEN, *supra* note 40, at 354-56; A. Goldstein, *supra* note 47, at 1152-53; Mannheim, *Trial by Jury in Modern Continental Criminal Law*, 53 L.Q. REV. 99, 388 (1937); POUND, pp. 391-92 and note 112 *supra*. Most of these discussions have unfortunately been wholly within the Battle Model framework.

182. Compare N. CHOMSKY, *Objectivity and Liberal Scholarship*, in AMERICAN POWER AND THE NEW MANDARINS (1969).

which criminal justice is "administered" upon the persons of its objects. In 1970, as in 1905, it is "a disgrace to our civilization."¹⁸³ The Battle Model ideology accepts the situation as, in its most essential aspects, inevitable; it purports to explain, to rationalize, even to justify the system we have and the way we apply it to individuals. It does this in terms of supposed laws of human nature (selfish and anti-social individualism) and official behavior (power corrupts), and the consequent necessities of social organization (the coerciveness of social power and the corollary need for limitations upon its exercise). The Battle Model, in short, derives directly from the conception of the war of all against all associated with Hobbes, whose candid views have always been most piously deplored by those whose ideology is based upon them.¹⁸⁴

It is worth wondering whether something akin to "counter-revolutionary subordination" may not be entering into the "scholarship" which continually seems to confirm the inevitability of the war of all against all and its ideological derivation in criminal procedure, the Battle Model.¹⁸⁵ Asked in a slightly different way, "If it is plausible

183. Taft, *The Administration of Criminal Law*, 15 YALE L.J. 1, 11 (1905). I quote Taft here particularly because—although this phrase, quoted out of context as it usually is, suggests the opposite—his views are distinctly Crime Control Model. He thinks the disgrace lies in the numbers escaping punishment. Since the Family Model which I am exploring is not necessarily lenient, I can adopt his sentiment here without embarrassment—while intending it primarily, of course, in the sense which Taft did not.

It is worth noting that Taft, like Pound, long anticipates the gist of Packer's theory. *Id.* at 2. Taft himself is similar to Pound in his Crime Control orientation. *Id.* at 11 and generally. In 1905, as in 1920 and now, the country was in a "crime wave." *Id.* at 15.

184. Holmes is a rare exception. See M. HOWE, JUSTICE HOLMES, *THE PROVING YEARS* 42-49, 171-176 (1963), for discussion of Holmes' theory of self-preference. As Howe shows, the connection between Holmes' views concerning the intrinsically selfish nature of man, and his insistence on the primacy of social over individual welfare, is direct—as in the case of Hobbes. "It may fairly be said, I think, that Holmes molded from the fierce individualism of a self-preferring ethic a philosophy of law which strengthened the foundations upon which collectivism was building." *Id.* at 176. Cf. WOLIN, *POLITICS AND VISION* 389 (1960).

185. On "counterrevolutionary subordination" see CHOMSKY, *supra* note 182; O'Brien, *Politics & the Morality of Scholarship*, in *THE MORALITY OF SCHOLARSHIP* (Black ed. 1967). Chomsky discusses "'counterrevolutionary subordination' of a much more subtle and interesting sort [than conscious mendacity]"—that which flows from unconscious ideological biases. CHOMSKY, *supra* note 182, at 124. He deals, in his essay, with the elitist ideological bias of liberal/communist scholarship, incapable of comprehending and evaluating a spontaneous social revolution (in Spain during the Civil War). Interestingly, the object of that revolution was to create a society like that of a particular revolutionary village in which "the whole population lived as in a large family; functionaries, delegates, the secretary of the syndicates, the members of the municipal council, all elected, acted as heads of a family. But they were controlled, because special privilege or corruption would not be tolerated. Membrilla is perhaps the poorest village in Spain, but it is the most just." *Id.* at 123. Chomsky's point is that such an account of a Family Model of society "with its concern for human relations and the ideal of a just society, must appear very strange to the consciousness of the sophisticated intellectual, and it is therefore treated with scorn, or taken to be naive or primitive or otherwise irrational. Only when such prejudice is abandoned will it be possible for historians to undertake

that ideology will in general serve as a mask for self-interest,"¹⁸⁶ then we should perhaps feel some duty to think about the kinds of self-interest which might underlie the Battle Model. One ought to be troubled that the criminal-law-that-is, and the ideology which seems symbiotic with it, can readily be interpreted as serving mainly the class benefit of the comfortable middle classes.

If one were to analyze the criminal process itself, and the "benefits" it has to offer to those who are exposed to it, it seems to me possible that one might conclude that the Battle Model ideology rationalizes and justifies a system whose "balance of advantage" rules give considerable advantage to middle-class defendants, but offer precious little protection to the great bulk of those who are processed by it and whose offenses are perceived, realistically or not, as directly threatening the social position of the middle class.¹⁸⁷ For the ordinary offender, the filigree of procedural rules which consumes, the attention of the Supreme Court, academic lawyers like Packer, and the public generally, is of doubtful significance. These rules seem to reflect little more than the concerns of the middle class in connection with the rare occasions on which it has to fear prosecution.¹⁸⁸ The Battle Model's lack of concern for what follows conviction—its reliance on social exile—perhaps responds to an accurate perception of what is, for the middle classes, unimportant. The Due Process Model in particular—the Model, as Packer says, of the "schools," of liberal intellectuals and enlightened

a serious study of the popular movement that transformed Republican Spain in one of the most remarkable social revolutions that history records." *Id.* at 123-24. The parallel to the role of ideology in criminal procedure is obvious.

186. CHOMSKY, *supra* note 182, at 72.

187. Of course, it is the reflection of a particular condition of society that the criminal law is conceived as dealing with social, rather than merely personal, pathologies. In Holland, by contrast with the United States, it seems that the criminal law is perceived far less as involved with social problems. It is therefore enabled to address itself in considerable part to individual difficulties, and the criminal process has significant Family Model elements. See F. Le Poole, *The Decision to Release a Partly or Wholly Non-Responsible Offender from Indeterminate Commitment for Treatment—In the Netherlands, 1969* (unpublished paper): "The social context of the Dutch crime problem is directly relevant to the appreciation of TBR [indeterminate commitment for treatment], because it seems quite natural that in a society in which obvious social problems cannot account for crime to the same extent as they do in the United States, there will appear to be good reason to deal with crime increasingly as a personal problem." *Id.* at 110. Compare DEVLIN, *supra* note 37, at 134-35; ALLEN, *Juvenile Court*, *supra* note 141, at 51-61. It seems that TBR was opposed by some at the time of initial enactment on the ground that "such a measure would contribute to a tendency to find fault with the individual offender rather than the society he lives in." Le Poole, *supra*, at n352, citing van Hamel, *Het Onwenselijke van eene Psychopathenstrafwet*, 23 *TIJDSCHRIFT V. STRAFRECHT* 149, 1962-63 (1912). Compare ALLEN, *supra*, at 59-60; BONGER, *supra* note 99, *passim*.

188. Cf. Currie, *supra* note 81, at 32. It is often noted that "crimes characteristic of the better-off strata of society [are] heavily under-represented" in the criminal process. RADZINOWICZ, *supra* note 1, at 67.

judges and lawyers—sometimes seems mostly a reflection of a vaguely left-wing concern about political prosecutions, rather than a response to the actual experiences of the sorts of people on whom the system ordinarily operates.¹⁸⁹ Surely the Fourth and Fifth Amendments, and all of their refinements, are fairly marginal in the actual administration of criminal justice; what is *not* marginal is the way ordinary defendants are treated during the process, and what happens to them afterwards. It is this reality which is so grim, which affects mainly the poor, and which the ideology of the Battle Model serves conveniently to explain, to excuse, and to justify.¹⁹⁰ It seems to me, in short, that we ought to feel queasy about the sources and the functions of the Battle Model.

189. Most people plead guilty. See REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 134 (1967). The extensive arsenal of procedural protections are little use to *them*. Most ordinary criminals are caught in, or virtually in, the act. Cf. Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1584-88 (1967). The constitutional rules covering pre-trial police behavior so much debated in recent years give *them* no particular comfort. The leading modern casebook on criminal procedure, however, devotes most of its attention to the constitutional law of criminal procedure—i.e. to the activities of the Supreme Court, and reactions to them—and very little attention to the ordinary workings of all the non-constitutional aspects of the process. HALL, KAMISAR, ET AL., *supra* note 77.

See, in connection with the irrelevance of much of our constitutional law of criminal procedure to the situation of most defendants, Judge Friendly's proposal that the privilege against self-incrimination be restricted in ordinary criminal trials, but broadened (albeit under the First Amendment's rubric) in political and religious cases. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CINN. L. REV. 671 (1968). Curiously, Judge Friendly—while generally of a mildly Crime Control Model orientation—invokes a distinctly Family Model argument against the privilege: it is inconsistent "with notions of decent conduct generally accepted in life outside the courtroom"—i.e. "no parent would teach such a doctrine to his children; the lesson parents teach is that while a misdeed, even a serious one, will generally be forgiven, a failure to make a clean breast of it will not be." *Id.* at 680. What he fails to note is that the Battle Model excludes the possibility of forgiveness.

The irrelevance of the constitutional law of criminal procedure to the circumstances of the ordinary defendant is particularly acute because no sustained effort to enforce it has been made. It seems to me that much popular and academic discussion of the Supreme Court's decisions in the criminal procedure field has suffered from an inability to focus on what actually was going on. Both critics and supporters attach great importance to the "rules" laid down by the Court; this is as the Battle Model says it should be. Almost no one has concerned himself with the actual *significance* of those rules in the life of concrete defendants. The Court, least of all, has confronted the problem of making its abstractions effective, but while it has been criticized for many things this most central failing has hardly been noticed at all. I cite two especially egregious cases: in *McCray v. Illinois*, 386 U.S. 800 (1967), the Court refused to insist upon the only practicable way of enforcing the ban on arrests without probable cause through use of the exclusionary rule—the rule remains, but is of doubtful use to those it supposedly protects; in *Swain v. Alabama* 380 U.S. 202 (1965), the Court held unavailable the only practicable way, under the circumstances, of enforcing its rule against racially-selected juries. Compare also, *Miranda v. Arizona*, 384 U.S. 436 (1966) with Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967). I think this lack of interest in substance, by contrast with a consuming preoccupation with form, is characteristic of both the Court and the Battle Model. The inner tension of the Battle Model, between Due Process and Crime Control strains, seems often to result in a compromise whereby the rules are Due Process and the reality is Crime Control. Cf. LIMITS at 239.

190. Most offenses concern property and therefore directly threaten the position of the

This brings me to my ultimate conclusion, which is that speculation about fundamental change in criminal procedure must begin with the development of ideological self-consciousness and speculation about the possibilities of ideological change. This is not a conclusion which is very favorable to the prospects of significant reform, but at least it might help us avoid moral and practical disasters like the juvenile court movement. The canons of American "scholarship" tend to make it difficult to approach ideological issues, which are, among other things, not very amenable to the manipulative techniques and "scientific" jargon on which the social sciences pride themselves. It is difficult to be fashionably "hard" about them; and I rather doubt the effort would be rewarding. Nevertheless, it seems to me that very little substantial progress is to be made in thinking about criminal procedure until we address ourselves to the ideological underpinnings of our thought. The first step in doing that is simply to set our minds free to wonder.

middle classes. But the whole category of essentially sumptuary crimes—drugs, sex, alcohol, and the like—can be seen as symbolic supports, as justifications, for their social position. See J. GUSFIELD, *SYMBOLIC CRUSADE* (1963). Cf. Barbara Wootton's views, *supra* note 68.